

VOL. XVIII

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION
MARK L. KAMHOLZ,

Defendants.

Proceedings held before the

Honorable William M. Skretny, U.S.

Courthouse, 2 Niagara Circle, Buffalo,

New York on March 26, 2013.

APPEARANCES:

AARON J. MANGO,
Assistant United States Attorney,
ROCKY PIAGGIONE, Senior Counsel,
U.S. Department of Justice,
Appearing for the United States.

GREGORY F. LINSIN, ESQ.,
JEANNE M. GRASSO, ESQ.,
ARIEL S. GLASNER, ESQ.,
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal
Sheila Henderson, Paralegal

Michelle L. McLaughlin, RPR,
Official Reporter,
U.S.D.C. W.D.N.Y.
(716)332-3560

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I N D E X

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JURY CHARGE CONFERENCE

3800

SUMMATIONS

Mr. Mango

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Mr. Linsin

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1 (Jury not present in the courtroom.)

2 THE COURT: Okay. Colleen, if you would
3 call the case, please, just to get us on track
4 here.

5 THE CLERK: Criminal case 10-CR-219,
6 United States versus Tonawanda Coke and Mark
7 Kamholz.

8 THE COURT: Okay. Let's see. The
9 attorneys are all here representing the parties in
10 the case, and we thought we'd have a continuation
11 in order to finalize the charge conference and the
12 charges. We're at the point where we were going to
13 start with charge number 39. I thought we'd
14 proceed in the same fashion that we did yesterday.
15 I know in the defendants' submission basically the
16 first charge that's addressed is 41. But does
17 anybody want to bring up anything preliminarily?

18 MR. PERSONIUS: No, your Honor.

19 MR. MANGO: No, your Honor.

20 MR. LINSIN: No, your Honor.

21 THE COURT: Okay. All right. Proposed
22 charge number 39, violations of the Clean Air Act.
23 Hold on one second.

24 Okay. Hearing nothing, charge number 39 will
25 be accepted. That runs from pages 54 through 67.

1 Okay. And then that takes us to charge number
2 40, purpose of the statute. Hearing nothing,
3 accepted. That's page 68.

4 Now we go to charge number 41, and that's the
5 elements of the offense. Mr. Linsin?

6 MR. LINSIN: Thank you, your Honor. What
7 we requested in our submission and what we believe
8 is necessary in order to give clear guidance to the
9 jury is that the Court break the Clean Air Act
10 instructions out into three separate instructions
11 to relate to the three groups of counts as we set
12 out in our submission, Counts 1 through 5 to be
13 addressed separately, Counts 6 through 10 to be
14 addressed separately, and then 11 through 15.

15 We believe it important, in part, your Honor,
16 because there are separate elements, in our view,
17 as recited in the indictment, separate conditions
18 in the permit that are referenced and that we
19 believe should be referenced in the instruction.

20 And, as we've indicated, with respect to
21 Counts 6 through 10, for the reasons we set out in
22 our submission, we believe that there should be an
23 additional element added to the list that is
24 currently contained -- list of elements currently
25 contained in draft charge number 41 relating to the

1 proof that there was no valid exemption in effect
2 during the time periods referenced.

3 So we are asking that these be broken out, not
4 in any way to complicate this charge, but to, we
5 believe, provide proper guidance and clarity to the
6 jury about what they must find with respect to each
7 of the three separate Clean Air Act groups of
8 counts.

9 THE COURT: Okay. I'm going to start out
10 this way. It's a little difficult, I mean, not
11 knowing the government's position because I still
12 don't have that from the government. You know, one
13 thing we do have, I think, is a jury that's
14 engaged. So, you know, I think that's helpful in
15 terms of the -- what we have to do with the charge,
16 if anything.

17 But, Mr. Mango, what's -- what's your view with
18 respect to the sufficiency of the charge as it now
19 stands?

20 MR. MANGO: Yes, your Honor. We do
21 believe it is sufficient, except for one change
22 that would be recommended in the third element,
23 which currently reads that "during the time periods
24 alleged in the indictment the defendant operated or
25 caused to be operated an emission source in

1 violation of the Title V operating permit." In the
2 government's view, consistent with all 15 counts of
3 the indictment, it actually -- the indictment reads
4 that "the defendant operated or caused to be
5 operated a stationary source in violation of a
6 Title V operating permit requirement." That, I
7 think, would get over the confusion of the fact
8 that in condition 4 it's actually called an
9 unpermitted emission source, and that in conditions
10 96 and 97, those are the quench towers, and
11 according to Mr. Linsin, those are not emission
12 sources. We strongly disagree with the fact that
13 Counts 6 through 10 need to have an additional
14 element.

15 We did draft something, your Honor. It just
16 didn't make it into final version to be ready to be
17 e-filed. We could do that later this morning if
18 you'd like. But it's our view that -- that these
19 elements, with just that change, would be
20 sufficient, and I don't think -- based on your
21 comments, your Honor, this jury is going to follow
22 you. And all 15 counts start out the same way.
23 The Tonawanda Coke Corporation operated a
24 stationary -- or the defendants operated a
25 stationary source in violation of a Title V permit.

1 And there's no reason not to capture all 15 counts
2 in one charge such as this, because all the
3 elements are the same, in the government's view.

4 THE COURT: Yeah, I'm inclined to go that
5 way. I don't think there's the necessity for the
6 insertion of an additional element in the second
7 grouping of counts that are proffered by the
8 defendants.

9 But what's your position, Mr. Linsin, with
10 respect to changing the third element from an
11 emission source to a stationary source?

12 MR. LINSIN: Your Honor, I just, frankly,
13 disagree with counsel's -- the stationary source
14 language is captured in the first element of this
15 instruction, and that is consistent with the
16 introductory language in each of the 15 counts, and
17 that's why we had no objection.

18 When we get down to the particularization of
19 each of the groups, Count 1, for example,
20 references a pressure-relief valve in the
21 by-products department, comma, an unpermitted
22 emission source. And then when you look to the
23 parallel language in the other groups, it is a
24 quench tower.

25 And so the language about a stationary source,

1 that is a necessary element. It is captured in the
2 first element, as recited in this draft charge, but
3 what it is that is actually charged as the
4 violation, the particularization for each of these
5 groups, in the language of the indictment in each
6 of the counts speaks of, for Counts 1 through 5, an
7 emission source. And we believe it is important
8 that the jury be guided and that the -- that the
9 requirement be clear that it be proven that it is
10 an emission source.

11 As the Court will recall, we believe that there
12 is a significant issue here as to whether the
13 pressure-relief valve was, in fact, an emission
14 source under the applicable regulations. And
15 failing to capture that, glossing it over and
16 repeating language of what is in the first element,
17 I think misleads the jury as to what -- what the
18 required elements are and what the allegations are
19 in these counts.

20 THE COURT: In Counts 1 through 5?

21 MR. LINSIN: Counts 1 through 5. And then
22 in 6 through 10 and, likewise, in 11 through 15,
23 instead of an emission source, it is referenced as
24 a quench tower, operation of a quench tower in
25 violation of a condition of the permit.

1 And we see -- I'm surprised, your Honor, that
2 the -- that the government would -- would oppose a
3 clear statement of what is actually recited in this
4 indictment. That is what they've charged. Making
5 it clear that the instructions and the elements
6 track what is alleged in these counts, I think
7 is -- assists the jury, makes sure that the
8 government is held to the proof that they have
9 alleged in these counts, and, honestly, if -- if
10 this current charge is -- were to be read by the
11 jury in parallel with the language that is set out
12 in each of these counts, I think there would be
13 inevitable confusion, and this charge does mislead
14 for that reason.

15 So we think, as I said, at a minimum these
16 groups need to be particularized as to what is
17 the -- either the source or the quench tower that
18 is referenced; and we would also think -- believe,
19 your Honor, that for that very reason it would be
20 important to recite that in Counts 1 through 5 it
21 is alleged that this -- the operation of this
22 emission source was a violation of condition 4 of
23 the permit. We see --

24 THE COURT: As opposed to just Title V.

25 MR. LINSIN: Exactly. And -- and then, in

1 parallel, for counts for the groups 6 through 10,
2 condition 96; and then 11 through 15, condition 97.
3 That's what is alleged. And I think it clearly
4 will help the jury in focusing its attention. It
5 is what is charged, and those charges should be
6 reflected as part of the burden the government has
7 in establishing these alleged violations.

8 I won't belabor the point, your Honor, with
9 regard to this exemption for the second group
10 there, 6 through 10, but I would point out that
11 this is an issue that we addressed during the
12 Rule 29 conference. It is clearly the theory upon
13 which the government has tried this case, and I
14 think exempting or removing that element which they
15 have assumed as a burden in the course of trying
16 this case, I think leaves the jury without any
17 guidance as to what to do with all of this evidence
18 that's been introduced about the exemption itself,
19 about the percentage of uses of these towers.

20 If I try to put myself in the place of a juror
21 and I look at this charge without any reference to
22 this exemption or its applicability to these
23 allegations for quench tower number 1, I think
24 without a reference to that exemption the jury will
25 be left without any clear guidance about what to do

1 with that evidence. And the government introduced
2 it for a reason. They knew it was an issue with
3 regard to these counts, and they now should be held
4 to that by inclusion of that element in these
5 counts.

6 THE COURT: By reference to the condition?

7 MR. LINSIN: By reference -- no, your
8 Honor. By reference -- well, by reference to the
9 condition, but by reference to the exemption that
10 relates to that quench tower. It's quench tower
11 number 1 in 6 through 10. That is an exemption
12 they understood applied. There has been abundant
13 evidence about this issue. Witnesses have been
14 questioned repeatedly about the initiation of the
15 exemption, about whether it was valid or not, about
16 the percentage of the usage, and whether it had
17 been voided. And now to leave the jury without any
18 guidance about what to do, what to make of that
19 evidence and how it relates to these counts, I
20 think is -- is failing to hold the government to
21 their required proof, but I also think would just
22 lead to confusion.

23 So I think this is an element, your Honor, that
24 the government has accepted as their burden on
25 Counts 6 through 10, and we believe that should be

1 reflected as a necessary element, given the facts
2 as presented throughout this trial.

3 THE COURT: But you can certainly argue
4 that point.

5 MR. LINSIN: Well, your Honor, without
6 clear guidance from the Court -- I can argue all
7 day long. But if the Court then tells the jury,
8 "Well, but that's not a required element," my
9 arguments go up in smoke. It should be a required
10 element. I can make reference to the exemption and
11 whether it was valid, but if the Court does not
12 clearly tell this jury the government's required to
13 prove there was no valid exemption, the jury's
14 going to think of these arguments as nothing but
15 smoke on my part. And I don't believe that is a
16 fair assessment of how the government has tried
17 this case and -- or a fair assessment of the
18 representations they made during the Rule 29
19 discussion on this issue.

20 MR. MANGO: Your Honor, these arguments
21 are -- seem to be identical to the Rule 29
22 arguments, that this -- this is not an element of
23 the offense. The conditions, which are in
24 parentheticals in all of the counts, so the first
25 five and a half lines of each of the counts are

1 identical, that they -- again they -- the
2 defendants knowingly operated a stationary source
3 in violation of its Title V permit requirements by,
4 and then it gives specificity in each of the 15
5 counts.

6 That language is identical, and that is what I
7 believe can be captured in these four elements, and
8 it's -- the fact that they're the owner or operator
9 of the stationary source in the first element, that
10 doesn't capture that they then operated that
11 stationary source in violation of their permit.

12 And --

13 THE COURT: Do you have any problem with
14 the language referencing the specific condition?

15 MR. MANGO: Well, your Honor, I don't
16 have -- I believe the government does not have a
17 problem referencing that Counts 1 through 5
18 particularize they violated the permit by emitting
19 coke oven gas from a pressure-release valve in the
20 by-products department, an unpermitted emission
21 source.

22 That parentheses, condition 4, I don't think we
23 need to reference that, because that's -- we get
24 into this tricky area where under the Clean Air Act
25 it's a general-intent statute, and we've got to be

1 careful that we don't add a specific-intent element
2 to it by --

3 THE COURT: But 4 -- I understand that.
4 I'm sorry to cut you off. But 4 is what applies
5 there. In 6 through 10 it's 96. So doesn't that
6 give direction without really running the risk that
7 you change the elements with respect to intent or
8 knowledge or whatever the case may be? There's --
9 there's no risk of that, really, is there?

10 MR. MANGO: Not -- not as proposed by the
11 Court. I would just be cautious if these are all
12 broken out separately. I think in this form,
13 covering them all 15 in one and then adding a
14 separate charge that counts -- you know, with
15 particularization, Counts 1 through 5 address a
16 violation of the Title V permit, and then just take
17 the language right out of the indictment, "by
18 emitting coke oven gas from a pressure-release
19 valve in the by-products department, an unpermitted
20 emission source." And then if you want to add the
21 parenthetical, that's fine. And then another,
22 Counts 6 through 10 relate to --

23 THE COURT: Yeah. Go ahead.

24 MR. MANGO: -- relate to violations of the
25 Title V permit, and then just follow the language,

1 "by operating the western quench tower," down the
2 line.

3 You could do that all in one instruction, so
4 you don't need -- in the government's view, you
5 don't need to go through each set of these when you
6 can do all 15 in one and then provide, if you want,
7 this specific instruction for each of the counts
8 afterwards.

9 THE COURT: Put yourself in the jury's
10 position, though. Don't you think it would be
11 helpful -- because we did talk about grouping of
12 counts throughout the course of the trial -- to
13 have it set out elementally as per each group? I'm
14 not talking about adding the exemption aspect right
15 now, but just in terms of the clarification with
16 respect to the condition and whether we're talking
17 quench tower 1 or quench tower 2, or --

18 But if you were to look at it, I mean, as the
19 jury, I mean, when you -- you know, I kind of came
20 in liking all 15, but to be covered by this one
21 general instruction, it does make it more
22 manageable in one respect, I mean, in terms of
23 presenting it. But from the jury's perspective I'm
24 wondering if maybe it would be helpful to break it
25 down with the specific conditions. It just would

1 help everybody focus a little bit.

2 MR. MANGO: Your Honor, if I could just
3 have one moment.

4 THE COURT: Yeah.

5 MR. MANGO: This is where -- we're
6 comfortable, your Honor, with whatever approach you
7 want to take. The concern is this knowledge
8 element. In the Second Circuit case law,
9 specifically in Weintraub, 273 F.3d 139 at 1478,
10 the Court talked about what knowledge is under the
11 Clean Air Act. And says that knowledge of the
12 facts and attendant circumstances that comprise a
13 violation of the statute, not specific knowledge
14 that one's conduct is illegal.

15 So this gets into -- if -- if the Court is
16 saying that the defendant had to -- I'm just
17 worried about element 3 and element 4 blending
18 together, where the jury will read the knowing --
19 the general intent knowing standard as knowing it
20 was a specific violation of condition 96 or 97.

21 THE COURT: So we could just work with the
22 third element and set it out in a way that would
23 relate to the three separate groupings, and that
24 would accomplish, I think, what you want, and I
25 think that would minimize the concerns that

1 Mr. Mango has, so that element 3 would be
2 individualized to the groupings.

3 MR. LINSIN: Your Honor, that's precisely
4 what we were hoping. Obviously, we still have this
5 issue with the second group, but -- concerning the
6 exemption, but that is what we think would be
7 faithful to what is charged, without in any way
8 suggesting that we intend to argue or suggest that
9 these are specific-intent crimes. We know better
10 than that, your Honor.

11 MR. PERSONIUS: Judge, I would like to be
12 heard briefly on the --

13 THE COURT: Yeah.

14 MR. PERSONIUS: -- please, to -- when
15 you're ready.

16 THE COURT: I'm going to confuse myself if
17 I let you speak too early here, Mr. Personius.

18 MR. PERSONIUS: I'm sorry.

19 MR. LINSIN: Your Honor, may I just -- I
20 understand that even if the Court does not accept
21 our argument on this language concerning the
22 exemption for the second group, I understand the
23 only issue then would be the -- the change in the
24 third element that we've been discussing. I just
25 believe it would be very helpful, even if the Court

1 would take the time to reread the first, second,
2 and fourth elements, to explain to the jury: Look,
3 here's your charge for Counts 1 through 5. And so
4 they've got a charge to go to as they consider
5 the -- here's your charge for Counts 6 through 10.

6 I see -- you know, the -- the benefit of
7 clarity, I believe, is far outweighed by the
8 minimal repetition that would occur. And I -- I
9 certainly see no prejudice to the government. So
10 that is -- that would be our recommendation to the
11 Court, and even if the language of the first,
12 second, and fourth elements didn't otherwise
13 change.

14 THE COURT: Yeah. I don't mind doing
15 that, necessarily. I think I'm going to make the
16 change, and we'll itemize it in terms of element 3.

17 (Discussion off the record.)

18 THE COURT: Okay. Yeah, I'm going make
19 the changes. We just have to figure out how I can
20 comfortably present it. And I want to -- you know,
21 when I give them the document, I want to have
22 something that they will not be confused by.
23 Because I think, very honestly, it really works to
24 both -- to the advantage of both sides to make this
25 as -- as clear as possible in terms of what we're

1 dealing with elementally. Because, you know, you
2 always run the risk that the jury could throw up
3 its hands one way or another against either side
4 because they simply don't understand it. And
5 that's not fair, I don't think.

6 I think we really want to get -- after all the
7 effort that went into this thing -- the jury to
8 really knowledgeably address these elements. And I
9 know, because I speak to the jury every single
10 case. I can -- I don't think I have a recollection
11 of one jury that I know of that has told me they
12 haven't gone to the elements discussions in guiding
13 their deliberations. So I really want to do that.

14 I want to work with Andrew a little bit until
15 we get what we're talking about now committed to
16 paper. I'll give it to you again. But, I mean, I
17 will change it, and I will make it more specific.

18 MR. LINSIN: Well, your Honor, I just -- I
19 think it would be of assistance, we think it is
20 faithful to the points we referenced, but in our
21 submission on pages 2, 3, and 4 we have proposed
22 language for what we believe those third elements
23 should be for each of those groups.

24 THE COURT: Yeah, I have that right here.
25 Okay. So I'm looking at it as we speak. But I

1 still need to determine how I'm going to do this in
2 terms of setting up the instruction for a
3 "threepeat," if you will. Okay. So -- but I'll
4 work on that, and I'll give it to you one more
5 time.

6 MR. LINSIN: All right.

7 THE COURT: Okay. Mr. Personius.

8 MR. PERSONIUS: Thank you, Judge. Judge,
9 this goes back to the -- the issue that relates
10 to -- I think I've got this right -- Counts 6
11 through 10, which is the first quench tower and the
12 exemption.

13 THE COURT: Yes.

14 MR. PERSONIUS: If something isn't put in
15 about the exemption and the jury reads the third
16 element, the risk is that they will say: Okay,
17 we've got quench tower number 1. They'll go to --
18 I think it's condition 96. Condition 96 says you
19 have to have baffles. They'll say: If we follow
20 the elements, there were no baffles in that quench
21 tower.

22 If some mention isn't made that there's an
23 exemption that the government has acknowledged from
24 its opening statement that applies here, and the
25 jury literally reads the elements, as Mr. Linsin

1 has indicated, he can talk until the cows come home
2 about the exemption, but if the jury is faithful to
3 the charge, they won't consider the exemption.

4 THE COURT: You know, I'm not sure -- I'm
5 not sure I agree with that, necessarily. I want to
6 work it out.

7 But, Mr. Mango.

8 MR. MANGO: Thank you, your Honor. The
9 government definitely does not agree with that.
10 There's been more than adequate discussion on the
11 record with evidence, with testimony, of what
12 condition 96 means based on the regulatory history.
13 The jury's got enough to weigh the exemption issue
14 in place here. And technically it's -- you know,
15 the indictment is what the indictment is. And
16 condition --

17 THE COURT: Well, yeah, but the operation
18 in violation of the Title V condition and permit
19 requirements, it's not in violation if there's an
20 exemption that applies, is what you're saying,
21 right?

22 MR. MANGO: According to the DEC
23 witnesses. According to the EPA witness who took
24 the stand, Mr. Eng, the defendants' witness, it's
25 the Title V document that controls. But there has

1 been enough of this discussion. There's evidence
2 in regarding this exemption. Your Honor, I believe
3 we're all going to reference it, probably, in our
4 closing argument.

5 MR. LINSIN: But the point is, your
6 Honor -- and I apologize for interrupting, but the
7 point is, if these instructions stand, however
8 eloquent I am or Mr. Personius is about this
9 exemption, Mr. Mango can state up in rebuttal close
10 and say: Look at the instructions the judge is
11 going to give you about the elements for these
12 offenses. There is a not a single word about
13 exemption in there. There's no requirement that
14 the government prove anything about exemption.
15 Follow the Court's instructions. Ignore this issue
16 of exemption, and -- and --

17 THE COURT: Well, he can't argue that. He
18 cannot argue that.

19 MR. LINSIN: On this count, with this
20 instruction as it stands, as Mr. Personius just
21 said, that's precisely what he can argue, that the
22 government has no burden under this -- under this
23 proposed charge. No burden to prove anything with
24 regard to the exemption, because it's not
25 referenced.

1 THE COURT: But you're saying that the
2 burden switches to you with respect to establishing
3 the applicability of the exemption.

4 MR. LINSIN: Your Honor, what we -- what
5 we are saying is that -- and the element we have
6 proposed is the government establish there was no
7 valid exemption. This is the government's burden.
8 The government's own witnesses have testified that
9 they believe this exemption was in effect until
10 November of 2009. Mr. Foersch testified about
11 that. The DEC, the agency that regulated this
12 facility for 25 years, has said with its own notice
13 of violation we're only going to order baffles in
14 quench tower number 2, not quench tower number 1.
15 They knew there was an exemption in effect.

16 These are the government's witnesses and the
17 agency that regulated the facility. And so the
18 government's burden, I believe, and the one they
19 have assumed in the way they've tried their case,
20 is to prove that there is no valid exemption. And
21 without a reference to that issue in these
22 instructions, the jury will have no way to place or
23 assess or evaluate what all this testimony has been
24 about.

25 THE COURT: Well, let me hear from you on

1 that, Mr. Mango, because my concern is -- is that
2 by not including it -- and, you know. I still
3 think that it can be argued and that it's not
4 blowing smoke, as you first referenced it,
5 Mr. Linsin, or who was it, the cows come home? Is
6 that what you said, Mr. Personius? I have both of
7 your characterizations. But, I mean, I think the
8 jury -- the jury has heard a lot about exemptions,
9 and they can come to grips with it. I haven't
10 settled this yet. But what -- my fear is this,
11 and, you know, maybe I've got it slotted wrong,
12 because Mr. Linsin didn't pick up on it. But what
13 I'm afraid of is that there's some shifting of the
14 burden to the defendants, and you don't want that
15 to happen, because that to me is reversible error.

16 So, against that backdrop, I mean, by not
17 proving that no exemption applies, doesn't that
18 shift the burden to some extent to the defense to
19 have to establish that an exception -- an exemption
20 is applicable? All right. And that's problematic,
21 perhaps. I don't know. You tell me.

22 MR. MANGO: Yes, your Honor. First, just
23 so the Court is aware and the parties are aware,
24 Mr. Piaggione is going to be doing the rebuttal.
25 Mr. Linsin mentioned Mr. Mango could get up on.

1 I'm going to be doing the closing. Mr. Piaggione
2 is going to be rebuttal.

3 THE COURT: Well, it's one and the same as
4 far as we're concerned.

5 MR. MANGO: It is true. Your Honor, I
6 don't think there is any type of shifting of the
7 burden in this case, because the government, one,
8 for the record, is not going to stand up and say
9 that we don't have to -- we don't have to prove
10 anything about an exemption, look at Title V. That
11 would be contrary to what we said on the record,
12 how the proof came in in evidence. Now, that
13 testimony, I believe, is what is controlling, that
14 according to the DEC's view, condition 96 had this
15 exemption. So, of course, we've got to show that
16 they violated the exemption.

17 THE COURT: Well, what does 96 require?

18 MR. MANGO: That -- 96 requires that all
19 wet quench towers be operated with a baffle system
20 to effectively reduce particulate emissions.

21 THE COURT: Does it reference exemption?

22 MR. MANGO: Condition 96 does not
23 reference the exemption.

24 MR. PERSONIUS: Why would you have a
25 four-week trial and risk this, and risk that --

1 that -- that there's a conviction on this set of
2 counts and then you go up on an appeal and the
3 Second Circuit says you should have included that,
4 because of the point you're making, Judge, about
5 it's burden shifting. And that's a good point.
6 But I think if you literally read the charge as
7 it's written out, it's going to create jury
8 confusion.

9 THE COURT: Well, I mean, you know, almost
10 all the time you ask for extra elements to be
11 inserted, Mr. Personius, because that puts a
12 greater burden on the government than what the law
13 generally requires. And that's problematic, and I
14 don't want to do that. I don't want to give them a
15 burden beyond what the law requires. But, you
16 know, I also have that counterconcern about
17 shifting the burden, to some extent. And I don't
18 know if -- if -- you know, the jury has heard so
19 much about exemptions. There's no reference to
20 exemptions in condition 96. I don't see why it
21 can't be forcefully argued without the jury -- and
22 I won't allow the government to say: Look, you
23 know, you don't have to consider the element of
24 exemption.

25 That doesn't make -- and that's your fear here,

1 Mr. Linsin.

2 MR. LINSIN: But, your Honor, let's set
3 aside for a moment that Mr. Piaggione -- no one on
4 the government's team argues that they don't have
5 to prove anything with regard to exemption. Let's
6 say the jury then walks out into the jury room with
7 this charge, with the charge itself that says
8 nothing about exemptions. Nothing. It is silent.
9 And the jury's going to be sitting there, "What the
10 heck was all that testimony about? How do we
11 apply -- how does that evidence of an exemption and
12 whether it's valid or not or what the percentage --
13 how does that relate to these charges?"

14 THE COURT: Well, they're going to say,
15 "We just heard Mr. Linsin and Mr. Personius argue
16 that they qualified for an exemption, therefore
17 they didn't violate the Title V permit
18 requirements."

19 MR. LINSIN: But, your Honor, you have the
20 final word. They are going to be told: These are
21 the elements the government needs to prove and only
22 these elements.

23 And if the Court doesn't give some guidance on
24 how that proof relates to these five counts, I
25 think, first of all, the -- the government's burden

1 that they have assumed in the way they've tried
2 this case will not be accurately reflected in the
3 charge, and the jury will be free to navigate the
4 assessment of the evidence on these five counts
5 without any reference or consideration to
6 exemption.

7 THE COURT: Well, let me ask you this. I
8 mean, the defense is always in a position to
9 defend. That sounds redundant; right? And in
10 order to defend there has to be a theory of
11 defense. The theory of defense in this case is --
12 at least with respect to 6 through 10, is that
13 there was no violation of the Title V permits
14 because there was an exemption that applied here.

15 MR. LINSIN: But, your Honor --

16 THE COURT: That's like an affirmative
17 defense in a civil case, isn't it?

18 MR. LINSIN: Your Honor, the truth of the
19 matter is, if the jury in this case goes no further
20 than the literal language of the Title V permit as
21 Mr. Mango has just said, they will not need to make
22 any question or issue or make any finding --
23 factual finding about an exemption. The Title V
24 permit says nothing about this exemption.

25 THE COURT: What about a separate charge

1 that qualifying as an exemption is a defense to
2 charges 6 through 10?

3 MR. LINSIN: Your Honor, because we don't
4 believe that this is a situation where the
5 defendants have the obligation to establish an
6 affirmative defense. We believe that the
7 government's own witnesses have testified they
8 believed there was an exemption that was in effect.
9 Their own evidence has shown that. And what we're
10 saying is the way they have tried the case, the way
11 the evidence has come in, makes it clear that if
12 there was going to be a violation for these baffles
13 in quench tower number 1, they have to prove beyond
14 a reasonable doubt that there was no exemption that
15 applied.

16 THE COURT: All right. All right. I'm
17 going -- I'll consider the argument. I don't think
18 I'm persuaded, but I'll -- I'll give it some more
19 thought, because, just as you did there, I don't
20 see why you can't argue that to the jury without
21 confusing the jury. You know, it's a pretty sharp
22 jury.

23 MR. LINSIN: Well, your Honor, as I said,
24 we can make the argument, but if the jury is
25 sitting in the jury room with the Court's charge in

1 front of it and it is silent on exemptions, those
2 arguments will have no place in the jury's
3 assessment of whether or not the government's met
4 its burden. None. I think it is -- it is -- I
5 believe the Court must give guidance to the jury on
6 what it is to do with these evidence -- this
7 evidence and how it relates to whether there was a
8 violation of the law.

9 THE COURT: All right. You know, I'm -- I
10 don't know if I want to include it as another
11 element. That's what I need to work out. I don't
12 disagree that some guidance may be warranted here.
13 Okay. But I just don't know if it -- if it
14 involves including it as a distinct element when
15 technically the charge on these violations don't.
16 So I don't know where the place is for it yet,
17 but -- but I think some guidance is probably a good
18 idea, and I just don't exactly know where.

19 MR. LINSIN: Well, I would only point out,
20 your Honor, we do not believe -- we strenuously do
21 not believe that the guidance should place that
22 burden on our shoulders.

23 THE COURT: Well, what about something, if
24 you believe that an exemption applies with respect
25 to 6 through 10?

1 MR. MANGO: And that the defendants
2 qualified for that exemption.

3 THE COURT: Then you should acquit.

4 MR. MANGO: Even something -- I agree. I
5 don't like appending it as an element. And in the
6 language that's included here, this is -- this
7 would be even more confusing, that fourth that
8 there was no valid exemption for the baffles
9 requirement in effect. That's -- that's not how
10 the testimony has come out. But I agree that
11 guidance would be -- would be acceptable with the
12 government in this case if it were something that
13 established and captured the testimony here at
14 trial.

15 THE COURT: If you find that the
16 exemption -- was it the 1994 exemption?

17 MR. MANGO: '84.

18 THE COURT: -- to the west quench tower.
19 Right?

20 MR. LINSIN: '84.

21 THE COURT: 1984. Okay. Exemption to the
22 west quench tower. If you find that, that it
23 applied, you should vote to acquit.

24 MR. LINSIN: Well, that -- that is an
25 articulation of an affirmative defense, your Honor,

1 and we believe it problematic. We believe it
2 absolves the government of a burden they should
3 have of proof beyond a reasonable doubt.

4 THE COURT: But does it? Because what
5 that does is it doesn't place the burden on either
6 side. It leaves it up to the jury to determine.

7 MR. LINSIN: By what standard, your Honor?
8 By beyond a reasonable doubt? That's -- that's
9 just the point if we do not include it as an
10 element. And that is why we're here. That is the
11 burden the government assumes by walking in this
12 courtroom with a criminal charge, and they should
13 not -- with these five counts -- we have attempted,
14 your Honor, to be fair and narrow in our proposals
15 here, but we are -- we don't find a formula that
16 properly captures this issue of the exemption for 6
17 through 10 without requiring it as an element of
18 the charges for those five counts.

19 THE COURT: Yeah, I mean, it does -- it
20 does cause -- there is cause for concern, I think,
21 in terms of by what standard does the jury make the
22 finding if it's not included as an essential
23 element of the government. I mean, from the
24 standpoint of does it have to be addressed in a
25 special verdict form, maybe it would have to be, if

1 we're dealing with setting it out in the language
2 of "if you find," because they could find, I
3 suppose, less than by a burden of beyond a
4 reasonable doubt. But then, again, it's not an
5 essential element, at least the way it's structured
6 here.

7 So I still don't know if that requires the
8 government to prove that no exemption applies. Let
9 me try to work something up. I'll go back to the
10 boards, and we'll talk about some guidance on that
11 exemption. I think that's -- I think we should do
12 something. I just don't know how we're going to do it
13 yet. So let me work on it. Okay? We're making
14 some progress in that regard. I think by your own
15 admission, Mr. Mango, something has to be done. I
16 just --

17 MR. PERSONIUS: Judge, could I -- I make
18 one suggestion, please?

19 THE COURT: Yeah.

20 MR. PERSONIUS: It doesn't add an element.
21 If the third element for those five counts, 6
22 through 10, were to read: Third, that during the
23 time periods alleged in the indictment the
24 defendant operated or caused to be operated an
25 emission source -- or whatever language gets used

1 there -- comma -- not subject to --

2 MR. LINSIN: Quench tower.

3 MR. PERSONIUS: Quench tower. But comma,
4 not subject to exemption, comma, in violation of a
5 Title V operating permit.

6 It doesn't add an element, but it makes it
7 clear that the exemption has to be considered.

8 THE COURT: That might do it.

9 MR. MANGO: That might.

10 THE COURT: All right. I don't want to
11 give you a lot of credit for that, Mr. Personius,
12 but I -- I think that might be helpful.

13 MR. PERSONIUS: I've got to wiggle out of
14 the "cows come home" point I made.

15 THE COURT: I know. Yeah, let me think
16 about that. That might work it. That might work.
17 All right.

18 MR. MANGO: Yeah.

19 THE COURT: Okay. All right. Andrew,
20 we'll note it.

21 LAW CLERK: I got it.

22 THE COURT: Okay. Yeah, I'm comfortable
23 with that. Okay.

24 That was 41; right?

25 MR. MANGO: Yes, your Honor.

1 MR. LINSIN: Yes, your Honor.

2 THE COURT: Okay. I mean, that
3 encompassed a lot, so, okay. We've got a little
4 bit of work to do on that, but I think that was
5 very helpful. Thank you.

6 Charge number 2, owner/operator.

7 MR. LINSIN: 42, your Honor?

8 THE COURT: Yes, 42. Hearing none,
9 acceptable.

10 43, stationary source and major source.

11 Hearing nothing, acceptable.

12 44, Title V operating permit program. Hearing
13 nothing, accepted.

14 46, Element 4, definition of "knowingly."

15 MR. LINSIN: I'm sorry. You missed 45.

16 THE COURT: Okay. New York State
17 regulation. Thank you.

18 MR. MANGO: Your Honor, I would suggest at
19 this point -- since this has now and is a factual
20 issue that seems to be in dispute, I would suggest
21 the adding after -- as part of this instruction,
22 adding four definitions that come right out of the
23 New York Codes, Rules and Regulations, which are
24 emission source, construction, modification, and
25 process. Because process is actually used in the

1 definition of modification.

2 I think that would -- that would help the jury
3 in tackling the factual issue with whether the
4 bleeder pressure-release valve is an emission
5 source.

6 THE COURT: Mr. Linsin?

7 MR. LINSIN: Which definitions? I'm
8 sorry. I didn't have my pen in my hand.

9 MR. MANGO: Yeah, I can give actual
10 citations too.

11 THE COURT: Just tell us the --

12 MR. LINSIN: Source point --

13 MR. MANGO: Yes.

14 MR. LINSIN: -- modification and process?

15 MR. MANGO: Yes. Emission source. But
16 under the regulations, emission source is actually
17 defined as air contamination source or emission
18 source. So if you look up just emission source
19 you're not going to find it. You're going to start
20 with air contamination source or emission source.
21 We could probably leave out the air contamination
22 source part. But that comes out of Part 200.

23 And in Part 201 there is the additional
24 language regarding construction.

25 MR. LINSIN: Can I just ask what -- what

1 version of these definitions you're referencing?

2 What -- what year?

3 MR. MANGO: My understanding is that the
4 current version, these -- these principles, these
5 four terms, have not been changed since 2005.

6 MR. LINSIN: But we're talking about a
7 permit that was issued in 2002. I think my view is
8 that we would either have to go with the versions
9 that -- as they existed in 2002 or separate
10 versions for the different years in the five years
11 of the indictment. If the -- if you're going to
12 include a definition, it has to be the definition
13 that is applicable to the time period in question.

14 MR. MANGO: In the indictment, which is
15 2005 to 2009, that would be the government's
16 position. And these definitions are consistent
17 during that time period.

18 THE COURT: All right. Well, list the
19 four. Then you have to get definitions, make
20 certain that they apply, and the same ones apply
21 between 2002 and 2005. If they're different, we'll
22 use the two different ones.

23 MR. MANGO: Your Honor --

24 THE COURT: If it doesn't become
25 overwhelmingly confusing.

1 MR. MANGO: Right. I think, again, the
2 time period would be 2005 to 2009. That's what's
3 charged in the indictment, the time period. I know
4 there was a reference that the Title V permit was
5 issued in 2002, but it's -- that's a living
6 document, and if there was a change, say in 2003
7 or 2004, in 2005 when the indictment is charged the
8 definition in effect should apply to what's charged
9 that year. But the terms are emission source,
10 construction, modification, and process. And I
11 could --

12 MR. LINSIN: Oh. Well, then, your Honor,
13 emission point also must be included. There was a
14 significant amount of testimony and questions of
15 the witnesses regarding an emission point, and the
16 distinction between source and point was a subject
17 of quite a bit of examination of the government's
18 witnesses.

19 I thought you had included point initially.
20 But point, we believe, would definitely need to be
21 added. Your Honor, let me think and take a look at
22 the applicability issue. Counsel may have a point
23 that we need not go back to 2002 if -- if --

24 THE COURT: If the permit process is a
25 living process.

1 MR. LINSIN: Exactly. Right. But one
2 point I would make, your Honor, also, on this
3 instruction is I think it would be helpful to
4 include an introductory sentence or two indicating
5 that this is -- this instruction is related to and
6 particularized as to Counts 1 through 5 of the
7 indictment. This doesn't really relate
8 meaningfully to 6 through 15.

9 MR. MANGO: That's fair.

10 THE COURT: Fair enough.

11 MR. LINSIN: And Counts 1 through 5 and
12 condition 4 of the permit.

13 THE COURT: Okay.

14 MR. LINSIN: All right.

15 THE COURT: Yes. Okay. But the
16 definitions -- I mean, assuming you get a chance to
17 look at those -- were we to include them, would
18 also include emission point?

19 MR. LINSIN: Yes, I believe that would be
20 fair.

21 MR. MANGO: I'll include the language
22 in -- I presume I'll email this to chambers and
23 counsel. Condition 4 says nothing about emission
24 point. That's -- that could be argued. There was
25 testimony what an emission point means.

1 THE COURT: There's so much that involved
2 that. I'll include the point. Send that out.

3 MR. MANGO: All right.

4 MR. LINSIN: Okay. Thank you, your Honor.

5 THE COURT: So that would be five
6 definition statements.

7 MR. MANGO: Yes.

8 THE COURT: Okay. All right. Where are
9 we by your count?

10 MR. LINSIN: 46, your Honor.

11 THE COURT: Knowingly?

12 MR. LINSIN: Yes.

13 THE COURT: Anything on that?

14 MR. LINSIN: Your Honor, I --
15 substantively, no. But just on page 75 of the
16 draft instruction, the first partial paragraph
17 there, I was not sure why that final sentence was
18 here in this discussion of knowingly.

19 THE COURT: You mean, "Then you must find
20 this emission was unpermitted and was in violation
21 of the Title V permit"?

22 MR. LINSIN: Right. I just -- I wasn't
23 sure if that was an artifact of or -- but -- well,
24 no. Actually, I withdraw my comment, actually.
25 Now when I look at the paragraph as a whole, I

1 think it is appropriate. It is a clarification.
2 And my only other point, your Honor, would be that
3 if we -- depending on how the Court resolves the
4 issue of -- well, no. I actually don't think it
5 would require modification of the discussion for 6
6 through 10 here. I think this -- this should --
7 can stay as is, even if the other modification we
8 were discussing is made, because this goes to that
9 intent element, the knowingly standard. All right.

10 THE COURT: Okay. Okay. Charge 47,
11 estoppel defense.

12 MR. PERSONIUS: Judge, we did include in
13 our submission a request that there be a brief
14 addition to that charge that is consistent, we
15 think, with Second Circuit precedence as
16 articulated in the two cases, Abcasis and George,
17 that we cite in our submission at page -- page 4.
18 And we've included on page 5 the paragraph, which I
19 think is maybe just two sentences, that we think
20 needs to be added to make it clear. What we're
21 particularly concerned about, Judge, is that it be
22 made clear to the jury that even if the jury were
23 to conclude that the elements of any given offense
24 had been proven beyond a reasonable doubt, this
25 defense of entrapment by estoppel is still

1 available to the defendants. And that's what the
2 Second Circuit has specifically articulated in
3 Abcasis and in George. And the charge as written
4 does not -- does not state that -- that clear to
5 the jury.

6 So the concern is, as written, the jury could
7 look at this charge, and one of the jurors might
8 say, "Well, we're satisfied that each element of a
9 particular count has been proven beyond a
10 reasonable doubt, and therefore we convict," and
11 that wouldn't be correct.

12 THE COURT: All right. I understand what
13 you're saying, but where does your proposed
14 language come from? Is that something that you
15 crafted?

16 MR. PERSONIUS: Well, it's taking -- it's
17 taking literally the language from George, I think,
18 Judge, with maybe one change. If you compare the
19 proposal we have with the George quote, which is on
20 the bottom of page 4, and the proposal's on the top
21 of page 5, they're almost identical. I can't tell
22 you immediately what the change is, Judge, but it
23 was simply a change made to make the charge
24 consistent with -- with our case.

25 THE COURT: All right.

1 MR. PERSONIUS: If you look at George, it
2 really comes right from that, with, I think, maybe
3 one word being changed.

4 THE COURT: Let me -- I mean, I think
5 that's right. So I'll just take a look at it and
6 make sure.

7 MR. PERSONIUS: I'm sorry I can't tell you
8 right now what the change is.

9 MR. MANGO: I see the change, your Honor.
10 It's the last -- in George, on -- in the block
11 quote on defense's submission, page 4, it says "in
12 reasonable reliance on a government," then says
13 "official's statement."

14 MR. PERSONIUS: Right.

15 MR. MANGO: In the block quote it says,
16 "committed in reasonable reliance on the conduct of
17 the government would violate due process or
18 fundamental fairness." It does change coverage,
19 and --

20 MR. PERSONIUS: But you recognize
21 otherwise on your charge, Judge, that the reliance
22 can be based not only on the statement but also
23 conduct. So I mean, it could say a government
24 official's statement or conduct, and then it would
25 be consistent with the rest of the charge.

1 That probably would be the best way to do it, I
2 think, and I should have done it that way.

3 THE COURT: I think -- I think that would
4 be all right. The government's -- reliance on the
5 government's statement.

6 MR. PERSONIUS: The government official's.

7 THE COURT: Official's statement or
8 conduct.

9 MR. PERSONIUS: Right. I should have done
10 it that way. I think Aaron's right.

11 MR. MANGO: Your Honor, putting that
12 aside, we do have a question as to what counts
13 entrapment by estoppel is that now the judge of the
14 law finds this applies to. Because we haven't
15 addressed that. In this charge it doesn't say you
16 should only factor this into, say, the RCRA counts
17 or, you know, the one -- one of the quench tower
18 counts or -- and I think we need to do that,
19 because we -- the government has a strong view that
20 this does not apply, entrapment by estoppel. If it
21 applies at all, it applies to Count 18 of the
22 indictment, which is -- we heard testimony that
23 there was potentially knowledge by the EPA that
24 they were going to remove the material from inside
25 the tank and place it on the coalfield.

1 The defense, in the government's view, hasn't
2 met its burden with respect to anything else. And
3 I think maybe we should need to, you know, work
4 that out here.

5 MR. LINSIN: Your Honor, as I read draft
6 charge number 47, the Court has stated at the end
7 of the very first paragraph that this -- this
8 defense relates to counts 1 through 15. And then
9 later in the draft charge the Court clarifies that
10 it also relates to counts 17, 18, and 19. The one
11 count excepted, and we're not disputing this, would
12 be Count 16, the obstruction count.

13 MR. MANGO: And it's the government's
14 view, your Honor, that the entrapment by estoppel
15 defense -- I mean, we have got now a witness who
16 testified, Gary Foersch, who said he didn't give
17 them authorization to operate the east quench tower
18 number 2 without baffles. In fact -- in fact, he
19 said, "You got to fix this." So, entrapment by
20 estoppel, they haven't met their burden on that.

21 Quench tower number 1, that's the exemption
22 issue. That doesn't apply to entrapment.

23 THE COURT: That's what you argue, right?
24 I mean --

25 MR. PERSONIUS: Judge, what the case law

1 says -- we talked about this in the pretrial
2 motion. What the case law says is there has to be
3 a basis in the evidence for the defense to be given
4 to the jury. Questions regarding credibility are
5 something that the jury should assess.

6 THE COURT: Yeah.

7 MR. LINSIN: That's where I think we are.

8 THE COURT: Okay. Yeah, I'll leave it
9 stand. I don't think it needs to be further
10 identified in terms of its applicability. It's
11 really a matter for argument based on the testimony
12 that the jury has heard.

13 Okay. Preponderance of the evidence. Okay.
14 Hearing nothing, that's accepted. That's number
15 48.

16 49, obstruction of justice. Hearing nothing,
17 accepted.

18 50, purpose of the statute. Hearing nothing,
19 accepted.

20 51, elements of the offense. Hearing nothing,
21 accepted.

22 I think we go down to 58 before we have any
23 other discussions.

24 MR. PERSONIUS: Yes, Judge. If you want
25 me to put it on the record, this primarily relates

1 to Mr. Kamholz, and we think the charge the Court
2 has proposed is appropriate.

3 THE COURT: Okay. Right up to 58 and then
4 elements of the offense we're okay?

5 MR. PERSONIUS: I've got it in my version
6 that goes to 54, and then I think 55 goes to the
7 RCRA.

8 THE COURT: Yeah, but -- I'm just talking
9 about no objections through 58.

10 MR. LINSIN: Your Honor, I have one
11 comment on charge -- proposed charge number 55. It
12 is minor, but in the introductory language to each
13 count, I would request -- in looking at Count 17 as
14 the first example, on the third line, I believe it
15 should read, "deteriorating tanks at the Tonawanda
16 Coke Corporation without a required permit," comma,
17 so the words "without a required permit" we would
18 ask be added in that location, and then a parallel
19 amendment to each of the introductory paragraphs
20 on -- with respect to Counts 18 and 19.

21 MR. MANGO: Your Honor, that's what -- the
22 indictment does include "without a permit." It's
23 the introductory language. I think he's trying to,
24 you know, focus the jury and capture it. If it
25 gets expanded too much, you lose the point of an

1 introductory paragraph. But we defer to the Court.

2 THE COURT: All right.

3 LAW CLERK: Can you say it one more time?

4 THE COURT: I'm sorry.

5 LAW CLERK: Could you say it one more
6 time?

7 MR. LINSIN: Sure. What I'm requesting --
8 I'll say it with respect to Count 17. The third
9 line on page 87.

10 THE COURT: Beginning with "deteriorating
11 tanks."

12 MR. LINSIN: "Deteriorating tanks at the
13 Tonawanda Coke Corporation without a required
14 permit," comma. So the words "without a required
15 permit" would be added before the comma and after
16 the word "Corporation."

17 THE COURT: So "without a required
18 permit," period.

19 LAW CLERK: Right.

20 MR. LINSIN: Well --

21 THE COURT: And then Count 17 reads --

22 MR. LINSIN: I'm sorry. It was a period.
23 Yes. I'm sorry. I thought it was a comma. Then
24 period. Yes.

25 THE COURT: Okay. Okay. All right. So

1 through 57, with that comment addressing 55, there
2 are no objections.

3 MR. LINSIN: No objections.

4 THE COURT: All those will be accepted.

5 We get to charge number 58, elements of the
6 offense.

7 MR. LINSIN: Right. Your Honor, we
8 believe that it is an accurate statement of the law
9 with respect to Count 17 -- well, as a general
10 matter, I'll state it, that with respect to the
11 RCRA counts, we believe that the Count 17
12 instruction should be a standalone instruction, and
13 then 18 and 19, both of which are disposal counts,
14 could, I believe, be addressed in tandem.

15 But we believe that, given that the material --
16 and there's a stipulation to this effect -- that
17 the material that is the subject of Count 17 had
18 been abandoned by a prior owner, and given what we
19 believe to be the uncontradicted evidence in the
20 case that without active management that material
21 was not subject to RCRA regulation, we believe the
22 government should be required, as the first element
23 here, to establish that the defendants actively
24 managed a waste that is subject to Count 17
25 after -- and we have proposed, your Honor, the date

1 of December 25th, 1990, which was actually the date
2 D018 wastes were defined as characteristic
3 hazardous wastes under the RCRA regulation.

4 It does not do violence in any way to the
5 government's proof. Their proof and theory of the
6 case is that active management occurred consequent
7 to that date. But we believe that's faithful to
8 the regulations. But we -- we believe, your Honor,
9 that without requiring that this be an element, the
10 jury again will have no way to assess the
11 significance or importance of whether this material
12 was actively managed or not.

13 And we also believe, your Honor, that there
14 needs to be a unanimity guidance with respect to
15 this element so that the jurors are told that --
16 and the special verdict form would then reflect
17 that they are unanimous as to what action they find
18 constitutes active management for this material.

19 THE COURT: Okay. Well, let's deal with
20 the inclusion of the December 25th, 1990, date.

21 MR. MANGO: Your Honor, my concern is that
22 the stipulation does not -- does not capture what
23 Mr. Linsin is telling the Court. The stipulation
24 says that some of the material that had been in the
25 two tanks had spread on the ground in the vicinity

1 of the two tanks. It doesn't say all of the
2 material on the ground were there prior to 1978.
3 That's not what the stipulation says.

4 And there's testimony that some of the material
5 flowed out of the tanks after 1990. So we get too
6 far into -- if I can finish here, there's clear
7 pictures which show that material had flowed out of
8 the tanks. There's testimony that material had
9 flowed out of the tanks. And I believe the way the
10 testimony has come out is that material that has
11 flowed out of the tanks subsequently after the
12 enactment of RCRA, you don't need to actively
13 manage. That is subject to RCRA regulation, and
14 you would need a permit.

15 So by appending this active management element,
16 it would -- it would cause a problem, in that it
17 would confuse the jury as to, well, what material
18 was there before 1990, what material may have come
19 out after 1990. That's --

20 MR. LINSIN: Well, your Honor, if that is
21 the government's theory, then this -- then the
22 instruction needs to be differentiated as to which
23 material is in issue and when the conduct occurred
24 that brought it within RCRA regulation. The charge
25 would need to be -- to provide clear guidance to

1 capture the points Mr. Mango has just made.

2 If they're not told somehow as to how this
3 material was under RCRA regulation or became
4 subject to RCRA regulation, the count is deficient,
5 and the government would avoid establishing
6 elements that are necessary to prove the charge.

7 THE COURT: Now, you're talking both with
8 respect to the date from which prospectively
9 there's a requirement for active management,
10 meaning December of 1990?

11 MR. LINSIN: No. I didn't hear Mr. Mango
12 to be debating the date for that. What I
13 understood Mr. Mango to be saying is that with
14 respect to the material that may have leaked out of
15 this tank at some point. What I understand
16 Mr. Mango to be saying is, I presume, based on the
17 testimony of Mr. Flax, that because that material
18 had previously been in a tank, it is Mr. Flax's
19 view that that was stored in the tank and thus
20 always subject to RCRA regulation from the date of
21 enactment of RCRA. That's if I understood
22 Mr. Mango's point. And then became subject to a
23 RCRA storage permit requirement once it flowed out
24 onto the ground.

25 But that is differentiated from the material

1 that is on the ground initially and over which some
2 breeze had been spread. And that active management
3 concept comes into play with respect to the
4 spreading of that breeze.

5 So, you know, to capture fairly the complexity
6 of the point that Mr. Mango is making here, the
7 jury needs to be given some guidance about how it
8 should assess the material that was once in the
9 tank and may have flowed out, and what law applies
10 to it, and then how the concept of active
11 management must be fit into the jury's assessment
12 of the regulatory status of material on the ground.

13 THE COURT: That's what Flax said, that
14 stored material was always subject to RCRA.

15 MR. LINSIN: That was his testimony, your
16 Honor. Miss Williams testified, as the Court may
17 recall, in a very different way.

18 But my point here is, clearly stating what the
19 law is -- and, you know, there is dispute on this
20 issue, and providing guidance to the -- to the jury
21 is what this charge is intended to do, and I
22 thought the fairest way, being faithful to the
23 general theory that the government had, was to make
24 it clear that the government had to establish there
25 was active management of the material on the

1 ground.

2 If the government is now saying they want to
3 also go with a theory that this material in the
4 tank was subject to RCRA, that raises a new set of
5 issues, but it doesn't negate the point I'm making
6 regarding how active management needs to be
7 considered with respect to the materials on the
8 ground.

9 THE COURT: This is Count 17?

10 MR. LINSIN: Yes, your Honor. Just as to
11 Count 17, the count which relates to storage of the
12 material on the ground without a permit.

13 MR. MANGO: Your Honor, if I could have
14 one moment, I want to consult with Miss Dubriel,
15 the EPA attorney.

16 THE COURT: Yeah.

17 MR. LINSIN: Could we perhaps take a --

18 THE COURT: Want to take a 15-minute
19 break? I'll tell you, you know, this is okay, and
20 I know you're going to -- you know, we're planned
21 to start at 12:00 o'clock or so. We'll watch that
22 a little bit. But, you know, we've got a little
23 time to work out the charge. I mean, we're not
24 going to have it by the time you finish your
25 argument. We're going to be working it through. I

1 mean, you basically know where we're coming from so
2 far, so we just have to -- you won't have it on
3 paper before you argue.

4 MR. LINSIN: As long as we have it clearly
5 articulated, your Honor, especially as to the --
6 the -- well, the points we focused on in our
7 discussion, that would be helpful.

8 THE COURT: Yeah. And I think -- at least
9 I'm clear in terms of where we decided we should go
10 with everything up to this point in time. So this
11 is a fresh start area right here. Let's take at
12 least 15, and then I want to give you some time
13 before we get --

14 MR. PERSONIUS: I was going to say, Judge,
15 I maybe mistakenly thought there would be at least
16 an hour between when we would finish this and when
17 we would close and --

18 THE COURT: We don't have too much more
19 after this, right?

20 MR. PERSONIUS: I just wanted to express
21 that.

22 MR. LINSIN: I believe that's correct,
23 your Honor.

24 MR. MANGO: I would agree if -- if I do
25 have to go back to the office, which I'd like to do

1 to email the definitions for these five regulatory
2 definitions, I would probably ask for something on
3 the order of an hour once we conclude here and
4 close, if that's possible.

5 THE COURT: Well, do you need that right
6 now? I mean, to get those definitions? Are you
7 going to reference those?

8 MR. LINSIN: I have them, your Honor.

9 THE COURT: Okay. All right. Okay, yeah.
10 I mean, we can do that. We'll take an hour. Let's
11 take 15 now.

12 MR. LINSIN: Thank you, Judge.

13 THE COURT: Thank you.

14 (Short recess was taken.)

15 THE COURT: Okay. And the attorneys are
16 back convened in U.S.A. versus Tonawanda Coke and
17 Mark Kamholz.

18 This last discussion that we started to have, I
19 think, as it related to Count 17, it seemed like --
20 I mean, frankly, I wasn't following it very well.
21 But is that something that the two of you,
22 Mr. Linsin and Mr. Mango, could work out, I mean,
23 on this date, or do we have to get it resolved this
24 way?

25 MR. LINSIN: We actually did have some

1 conversations after the break, your Honor. I'm not
2 quite sure where Mr. Mango is on this. I believe
3 it would be unnecessarily complicated to get into
4 this storage issue and the tank material. The
5 concept, I think, that Mr. Mango was referencing,
6 this issue of the material leaking out of the tank,
7 it could actually be considered within this
8 definition of active management, because active
9 management includes the addition of a hazardous
10 waste to preexisting wastes.

11 So I don't know Mr. Mango's position on that.
12 Our basic point, your Honor, hoping we don't
13 complicate this issue with the concept of storage
14 in the -- of the material in the tank, because,
15 honestly, I don't know how the Court can resolve
16 that as a legal issue, given this record and the
17 fact that it is coming up at this late hour. And
18 there is conflicting testimony about the legal
19 status of this material inside the tank.

20 But our basic point is that, at least with
21 respect to active management, we believe it is a
22 factual issue, a factual issue that the jury must
23 find in order to conclude that a violation
24 occurred. The stipulation of the parties was that
25 the material inside the tank and on the ground

1 outside the tank had been abandoned by a prior
2 owner. And there is the pretrial submissions on
3 this issue, and the testimony, I think, has been
4 consistent that abandoned material does not become
5 subject to RCRA regulation unless there has been
6 active management. And holding the government to
7 that proof as an element of this offense I think is
8 imperative.

9 THE COURT: I think that's right. I mean,
10 that's the testimony, that unless active management
11 is factored in, abandoned waste is not subject to
12 RCRA.

13 MR. MANGO: That's correct, your Honor. I
14 think we -- we are in agreement on that. The --
15 what the government, now that I've had a chance to
16 counsel, is strongly opposed to any inclusion in a
17 special verdict form in terms of what activity the
18 jury needs to find unanimously constituted active
19 management.

20 The term is going to be defined by the Court,
21 and the facts have been examined during -- during
22 testimony, and they have that. They don't need a
23 special verdict form on that issue.

24 THE COURT: Yeah, let me hold you right
25 there. I don't think you're asking for that, are

1 you?

2 MR. LINSIN: Well, your Honor, I'm not
3 asking in the special verdict form that the jurors
4 detail what activity they find to have been active
5 management. That's not our request. But because
6 there -- there have been -- there is testimony
7 about a number of activities which potentially
8 could constitute active management, we do believe
9 it's -- it is required that the jury be instructed
10 that they agree unanimously on which activity
11 constituted active management.

12 Because, in the absence of that, your Honor,
13 you could have six jurors concluding that the
14 leakage from the tank is active management, six
15 jurors concluding that spreading of coke breeze is
16 active management. And that is not permissible.
17 So it is not a request that the jurors specify,
18 yes, we believe spreading of coke breeze, but just
19 a special verdict form saying that we have found
20 unanimously that -- that there was active
21 management with respect to a given activity. That
22 I think is important because of the range of
23 testimony about the interaction with this material.

24 THE COURT: Mr. Mango?

25 MR. MANGO: Yes, your Honor. The -- the

1 issue with active management comes up -- obviously,
2 you've heard the testimony. Material is on the
3 ground prior to the enactment of RCRA; RCRA gets
4 enacted; if they left it alone they're fine. But
5 if they actively manage it, then -- then that --
6 that's the requirement for regulation under RCRA.
7 And that is captured in the count of the indict --
8 or the element of the charge which talks about in
9 Count 17 the fact that they did not have a permit
10 to store this material on the ground. That -- that
11 is -- that, in essence, captures this active
12 management.

13 So I think we're maybe talking about two
14 different things. I guess I'm not really focused
15 on what specifically is being requested to be
16 changed in the elements of the offense charge.

17 MR. LINSIN: Well, and -- I'm sorry,
18 Mr. Mango -- on page 6 of our submission we have
19 proposed that a first element be included with
20 respect to the instruction for Count 17 to the
21 effect that, first, the defendant actively managed
22 a waste that is the subject of Count 17 after
23 December 25th, 1990. We believe that should be the
24 threshold, the first element, for this charge for
25 Count 17.

1 And, as we go on to say, we believe there
2 should be a corresponding finding in the special
3 verdict form -- I think this is addressed in
4 footnote 4 on page 6 -- that they be instructed
5 they must unanimously agree as to what, if any,
6 activity constituted the active management that is
7 the subject of the count. And then a special
8 finding in the verdict form that they -- they so
9 found unanimously.

10 THE COURT: That there was active
11 management but without specificity.

12 MR. LINSIN: Exactly. That they -- that
13 they found unanimously as to what, if any, activity
14 constituted active management. Not that they all
15 separately agree that different things constituted
16 active management. That finding, your Honor, we
17 believe has to be unanimous under Apprendi.

18 MR. MANGO: Your Honor, my -- my concern
19 right now is on this fifth element on page 6 of the
20 defendants' submission, which says that RCRA permit
21 was required --

22 MR. LINSIN: We haven't -- we haven't
23 gotten to that point, your Honor. We do believe,
24 and we've set this out on pages 6 and 7 of our
25 submission -- we do believe that it is appropriate

1 to include the requirement that a RCRA permit was
2 required to store this hazardous waste, and then
3 that there was no RCRA permit issued to Tonawanda
4 for that activity.

5 MR. MANGO: They're reading that
6 backwards, though, your Honor. The statutory
7 elements under the case law is that they stored
8 without a permit. That's it. Period. We
9 shouldn't try to reshuffle these elements -- or
10 this language -- to fit that they had -- they had
11 to get a permit to store this material.

12 THE COURT: We're saying the same thing,
13 aren't we?

14 MR. MANGO: Yeah, it is, but the case
15 law -- the Second Circuit case law is clear it's
16 storage without a permit. That's what the
17 government needs to prove.

18 THE COURT: All right. And I -- that's --
19 I don't see why that doesn't work.

20 MR. LINSIN: Your Honor, we believe this
21 is a clearer statement. I'm not going to belabor
22 the point. We think -- I don't think the
23 government disputes the concept here --

24 THE COURT: I don't think they do either.

25 MR. LINSIN: -- that a RCRA permit is

1 required and that no permit was obtained. And I
2 see no harm at all, no additional burden, in just
3 making that clear. But our larger point on this
4 Count 17, your Honor, relates to this additional
5 element concerning active management.

6 THE COURT: Yeah. And I don't think
7 Mr. Mango has a problem with that, so I'm inclined
8 to include that, that there is the active
9 management waste requirement. But I'll leave the
10 language with respect to the RCRA permit the way it
11 is.

12 MR. MANGO: Yes, your Honor. You do have
13 it in your fourth element there that the defendant
14 did not have a permit to store or dispose for
15 Count 18, but really stored. And that's what the
16 case law says.

17 THE COURT: Okay. All right.

18 MR. MANGO: Thank you.

19 THE COURT: Andrew, we're okay with that?

20 LAW CLERK: Uh-huh.

21 THE COURT: Okay. Let's move on then.

22 MR. LINSIN: Your Honor, on -- given our
23 last discussion, I -- I question now -- well, I
24 guess the government would still want this. But
25 with respect to draft charge 59, I would request

1 that in the last sentence the two words be added.
2 The sentence currently reads, "Wastes that have
3 already been disposed of cannot be considered to be
4 in storage." I would just request that it state,
5 "Wastes that have already been disposed of or
6 abandoned cannot be considered to be in storage."

7 MR. MANGO: No, your Honor. That would be
8 attempting to add, in our mind, your Honor, a
9 little bit -- a defense into that sentence,
10 because, you know, this then touches back into the
11 active management area that if it's -- even if it's
12 abandoned, but they actively manage it, then it's
13 considered storage. So the language, in the
14 government's view, is fine as it is. And it
15 does -- that -- the first part of that language
16 comes right out of RCRA.

17 MR. LINSIN: Your Honor, I don't believe
18 the government disputes the -- the accuracy of the
19 addition I'm proposing. It is simply a
20 clarification for terms that have been used
21 essentially interchangeably in this trial.
22 Disposed of or abandoned cannot be considered to be
23 in storage. If those materials are thereafter
24 actively managed, then -- then they are subject to
25 RCRA requirements. So it fits precisely with our

1 previous discussion on active management.

2 MR. MANGO: Your Honor, I disagree. I
3 think this would change your definition of -- would
4 modify the discussion previously about active
5 management, and, in fact, obviously there has been
6 some agreement that the material on the ground had
7 been abandoned, but we're not -- we are saying very
8 much so that because it was actively managed it was
9 stored. So that would -- that would create
10 confusion and inject a defense that: Well, wait a
11 second, the government agrees it was abandoned.
12 The judge is going to tell you wastes that have
13 been disposed of or abandoned can't be considered
14 to in be in storage. So how can we be in violation
15 of Count 17? Everybody agrees it was abandoned.

16 That's -- that's not what the testimony of
17 Mr. Flax was. There may be a dispute on that, but
18 if there's a dispute it shouldn't be included in
19 the definition of storage.

20 MR. LINSIN: Perhaps a way to address
21 counsel's concern would simply be to say, "Wastes
22 that have already been disposed of or abandoned
23 cannot considered to be in storage unless they are
24 first actively managed."

25 MR. MANGO: That's -- that's also -- that

1 would -- that would negate the testimony of
2 Mr. Flax, who said the material in the tanks that
3 we agree was abandoned, in his view, was considered
4 storage. So, again, I don't think any change in
5 this is necessary at this point. We're trying to
6 keep this clean for the jury. This is clean.

7 MR. LINSIN: Well, my concerns now are
8 heightened, because it now appears that the
9 government will be arguing an additional theory
10 here that I thought we had escaped in our
11 discussion in the last draft charge, and that is
12 that the jury can convict based on the testimony of
13 Mr. Flax that this material inside the tanks was in
14 storage as of the date of the RCRA -- the enactment
15 of the RCRA statute. The Court has made no finding
16 about that as the controlling law in this case.
17 There is conflicting opinion testimony about that
18 issue, and I don't believe counsel should be
19 permitted to argue that as a legal theory for
20 liability on Count 17.

21 MR. MANGO: We're not planning to, your
22 Honor. We just don't want to add a confusion that
23 we don't need here.

24 THE COURT: Well, how is it confusing to
25 say, "disposed of or abandoned unless it's actively

1 managed"?

2 MR. LINSIN: "Cannot be considered to be
3 in storage unless it is first actively managed."
4 It clearly synchs up with the discussion on active
5 management.

6 MR. MANGO: That's not what Mr. Flax said.

7 THE COURT: Well, it doesn't matter what
8 he says. Right?

9 MR. LINSIN: Exactly.

10 MR. MANGO: I know, but the Court would
11 then be giving a statement to the jury that
12 Mr. Flax was either wrong or his testimony was
13 irrelevant or --

14 THE COURT: Well, you can still argue
15 that, right?

16 MR. MANGO: Your Honor, the definition, as
17 well -- I believe, the definition of solid waste
18 does state that it can be discarded by being stored
19 in lieu of incineration and disposal. And I'd like
20 to check the language in RCRA that -- that storage
21 comes from, because I think it -- I'm kind of at a
22 loss here. I don't know why we're trying to modify
23 something that really has no bearing on the issues
24 in the case here.

25 MR. LINSIN: Your Honor, my proposal, I

1 think, is an effort to help clarify this concept
2 and to help explain to the jury how they should
3 consider this definition in conjunction with the
4 concept of active management. I don't believe
5 there is any -- I don't hear any real dispute about
6 the accuracy of what we propose. And I don't see
7 it as -- as confusing issues. I see it as helping
8 to clarify this instruction for the jury.

9 MR. MANGO: But -- but it would be, your
10 Honor. These are questions the jury had -- that
11 the jury included in their questions, so this is
12 something that's very much in their minds. So by
13 including this language, "Wastes that have already
14 been disposed of or abandoned," that's -- that's
15 not what the RCRA definition of storage says. It
16 simply says, "Wastes that have already been
17 disposed of cannot be considered to be in storage."

18 And there has been differing testimony as to
19 what the material -- and I guess the nature of the
20 material inside the tanks. And I think if -- if
21 this change is included, then the defense in that
22 definition is -- is essentially allowing the Court
23 to -- to strike down Mr. -- a portion of Mr. Flax's
24 testimony.

25 THE COURT: Well, is that an addition to

1 the definition in RCRA of storage?

2 MR. LINSIN: Your Honor, I don't have my
3 regulation book here. I don't -- I don't know off
4 the top of my head, your Honor. I can't represent
5 to the Court. I did not understand this to be a --
6 the last sentence, anyhow, to be a quotation from
7 the RCRA definition. If that is counsel's
8 representation, then, yes, I would be proposing a
9 clarifying addition to the definition, that -- that
10 I think is helpful.

11 THE COURT: All right. If RCRA says what
12 it says here, I'm going to go with that, and I'll
13 deny the request to augment. Okay. Let's move on.

14 If it's -- if it doesn't say what this says it
15 purports to say, then -- then I think that gives us
16 wiggle room to clarify.

17 MR. LINSIN: And, your Honor, just to be
18 clear, if this is a complete quote for the
19 statutory, I guess, not regulatory definition of
20 storage, then -- well, I'll withdraw my
21 objection -- or my request.

22 THE COURT: Okay. Okay. All right.

23 Disposal, 60. Okay. Hearing nothing,
24 accepted.

25 61, solid waste. Hearing nothing, accepted.

1 62 --

2 MR. MANGO: Your Honor, with 61, now that
3 there has been discussion of solid waste and the
4 government has put in our proposed summary chart,
5 Government Exhibit 212, that -- there's certain
6 language that was focused on in that chart that
7 maybe we want to focus on solely in this
8 instruction. I leave it at the Court's discretion
9 on that. But there was really two key elements in
10 solid waste that apply under the recycling
11 provision, whether it is being used to produce a
12 fuel, which is not included here, or used -- used
13 or applied to the land in a manner constituting
14 disposal.

15 I think -- I think that would make sense to
16 maybe expand this a little bit now that we've got
17 the testimony of both Miss Williams and Mr. Flax.

18 MR. LINSIN: Well, now -- now I'm
19 confused. Is this -- is what is proposed in charge
20 61, is that a -- is that a quotation from the
21 statutory definition of solid waste?

22 THE COURT: That comes off of the chart,
23 right? That language that you were referring to?

24 MR. MANGO: Well, that's what I would
25 propose come into here. I think this is -- this is

1 a modification of that, but I would just, I guess,
2 ask that -- that we be truer to what is on
3 Government's Exhibit 212 and -- and which models
4 the regulations, which is the exact language out of
5 the regulations.

6 THE COURT: Well --

7 MR. LINSIN: My question went to whether
8 we're now switching back and forth when it suits
9 our purpose between a statutory definition and a
10 regulatory definition.

11 THE COURT: And that's where I was going
12 to go with that question. Is this a regulatory or
13 statutory definition? And then you're asking what
14 you just said you didn't want to do in the prior
15 discussions. So if this is what the regulatory or
16 statutory definition is, we'll leave it alone.

17 MR. MANGO: I think it's a little of both,
18 your Honor. I think there's a statutory portion in
19 here and a regulatory portion.

20 THE COURT: Well, that's good enough, I
21 think, then. We'll just leave it that way.

22 MR. MANGO: Yes, your Honor.

23 THE COURT: Thank you. 62 is K087.

24 MR. LINSIN: And, your Honor, we had in
25 this regard made a request that is contained in our

1 pages 7, 8.

2 THE COURT: That's with respect to intent
3 element?

4 MR. LINSIN: That is correct, your Honor.
5 And we believe that was the basis -- the expressed
6 basis of Magistrate Judge Schroeder's ruling in
7 the -- with respect to the dispositive motions on
8 these counts, expressly contained in his report,
9 recommendation, and order, which was adopted by
10 this Court. Magistrate Schroeder clarified that
11 the government would need to prove an intent to
12 dispose of this material, with respect to the
13 disposal counts, and that would go to 18 and now
14 19.

15 We believe that the law-of-the-case doctrine
16 and the holding of Magistrate Judge Schroeder's
17 report, recommendation, and order, which has been
18 adopted by this Court, now requires the government
19 to prove that element with respect to the two
20 disposal counts.

21 THE COURT: Yeah, but we talked about that
22 in the context of the decision he rendered and not
23 for purposes of the proof element at trial, as I
24 recall it. Because it had that limited
25 applicability. It was with respect to the

1 decision.

2 Mr. Mango?

3 MR. MANGO: Yes, your Honor. I have that
4 decision. We did discuss this. It's my
5 recollection -- well, I have it here -- that at
6 page 17 Judge Schroeder specifically said,
7 "Notably, the defendants' argument turns on a
8 determination of the defendants' intent." So he
9 acknowledged that it was the defendants' argument
10 that there's this intent element.

11 But in no way is he trying to bind your Honor
12 in making, you know, a determination on what the
13 elements of RCRA are.

14 MR. LINSIN: Your Honor --

15 THE COURT: It's been your consistent
16 position that there is no intent element that needs
17 to be proven by the government with respect to
18 satisfying Count 19.

19 MR. MANGO: Correct, your Honor, other
20 than just the general "knowingly" intent, not an
21 intent to dispose, which is requested.

22 MR. LINSIN: Well, your Honor, I would
23 point out that on the very next page of Magistrate
24 Judge Schroeder's ruling he stated, "In addition to
25 the issue of whether the defendant intended to

1 dispose of material" -- in addition to that issue.

2 "There also remains" --

3 THE COURT: He says "issue," right? He
4 doesn't say "element."

5 MR. LINSIN: Yes. Yes. "There also
6 remains the issue of whether the conduct of the
7 defendant and its employees in mixing this material
8 constituted land disposal."

9 These are issues in the trial, issues that
10 Magistrate Judge Schroeder clearly said would be
11 reserved for findings. "As discussed above, there
12 are a myriad of factual issues, including the
13 penultimate issue of the defendants' intent, which
14 all must be resolved by the jury."

15 And the fact is, your Honor, by making those
16 findings and ruling as he did on these motions with
17 that recognition in mind that these were factual
18 issues for the jury to resolve, without presenting
19 that issue for the jury to resolve, we are negating
20 what we see is the clear holding of this ruling by
21 Magistrate Judge Schroeder.

22 THE COURT: I don't really agree with that
23 position. Mr. Mango, do you take issue?

24 MR. MANGO: Yes, your Honor. We've
25 expressed our position.

1 THE COURT: Okay. And I don't view it as
2 law of the case, so I will deny that request for
3 the addition of the intent element.

4 Okay. All right. Proposed charge 63,
5 hazardous waste. Hearing nothing, accepted.

6 64, knowledge. Hearing nothing, accepted.

7 65, permit requirement. Hearing nothing,
8 accepted.

9 Entrapment by estoppel defense. Okay. We
10 talked about that previously, but with respect to
11 this placement, hearing nothing, accepted.

12 67, aiding and abetting. Hearing nothing,
13 accepted.

14 Venue, various states, et cetera. Hearing
15 nothing, accepted.

16 So that will take us through 77.

17 Okay. Thank you. Appreciate it. Very
18 helpful, very constructive, I think.

19 Chris, is the jury here?

20 COURT SECURITY OFFICER: I know they are,
21 but I haven't checked on them personally.

22 THE COURT: Okay.

23 MR. LINSIN: 45 minutes?

24 THE COURT: 1:00 o'clock or 12:45?

25 MR. LINSIN: I would ask 1:00 o'clock.

1 THE COURT: All right. Chris, tell them
2 that we will start at 1:00 o'clock with closing
3 arguments.

4 Does that work for everybody?

5 MR. LINSIN: Just for guidance, your
6 Honor, does the Court intend after the government's
7 opening closing to take a break, or are we just to
8 proceed forward from there?

9 THE COURT: No, we'll take a break,
10 because that's an hour anyway. All right. So
11 we'll take a little break, and then we'll go with
12 the defense argument and we'll break, and we'll do
13 the rebuttal and we'll break. And the way it's
14 shaping up right now, we're probably looking at
15 completion of the charge tomorrow.

16 MR. LINSIN: All right. Thank you very
17 much, your Honor.

18 MR. PERSONIUS: Thank you, Judge.

19 THE COURT: All right. If anybody is here
20 for the starting of the trial, that will not get
21 started until 1:00 o'clock, just so you know.
22 Okay. We're just a tad behind, but we need that
23 time to get everything taken care of so we can have
24 an effective oral argument.

25 Okay. Mr. Moeller, is there anything?

1 LAW CLERK: No, Judge.

2 THE COURT: Okay. Thank you very much.

3 (Lunch recess was taken.)

4 (Jury not present in the courtroom.)

5 THE CLERK: Criminal case number
6 10-CR-219, United States versus Tonawanda Coke and
7 Mark Kamholz.

8 THE COURT: Okay. For the record the
9 attorneys and parties are back present. The jury
10 is assembled. We will bring them in shortly. I
11 just want to make sure that the rules are clear.
12 The government will commence the closing arguments,
13 followed by Mr. Linsin and Mr. Personius, and then
14 there will be the opportunity for a rebuttal
15 argument by Mr. Piaggione.

16 Is that the understanding of counsel?

17 MR. MANGO: Yes, your Honor.

18 MR. LINSIN: Yes, your Honor.

19 THE COURT: Okay. And we will break after
20 each argument for a short period of time. Are
21 there any preliminary matters?

22 MR. MANGO: No, your Honor.

23 MR. LINSIN: No, your Honor.

24 MR. PERSONIUS: No, your Honor. Thank
25 you.

1 THE COURT: Okay. I think we therefore
2 are ready.

3 Chris, if you would bring the jury in please.

4 (Jury seated.)

5 THE COURT: Good afternoon. Please have a
6 seat. Okay. Are you looking for something?

7 A JUROR: It was glasses. My eyeglasses.

8 THE COURT: You have them or you don't?

9 A JUROR: This is a second pair.

10 THE COURT: Okay. You probably won't need
11 the glasses to hear the attorneys is my view.

12 But welcome back, again, ladies and gentlemen.
13 And thank you for assembling promptly. We have
14 been working through matters, and we are ready now
15 for closing arguments. And soon you will be
16 wearing the mantle of the judges of the facts. And
17 I ask you though to, once again, reserve judgment,
18 keep your minds open, keep focused on how important
19 this case is to both sides.

20 You are the determiner of the facts. Nobody
21 has more information about this case than all of
22 you do as a result of the presentation of the
23 evidence in this case, which consists of the
24 answers to the questions by the witnesses, the
25 exhibits that have been received into evidence, and

1 the stipulations that have been entered between and
2 among the attorneys in this case. You know this is
3 an important matter and case to both sides. If you
4 keep your minds open, that's my instruction to you,
5 and you will start for the first time really
6 discussing the case when you enter your
7 deliberations. And that's when I ask you, once
8 again, to respect each other's views, to focus on
9 the application of common sense, experience, and
10 intelligence. You know how many times I've
11 mentioned that to you right from the outset in this
12 case. But that's what it takes. It's not
13 overwhelming.

14 You yet have to receive from me the completed
15 instructions in the law which you are to accept
16 without questioning the wisdom of the law. And
17 I've been working very hard with the lawyers, and
18 they're making every effort to make certain that
19 the law that I present to you is not only correct,
20 but will be of assistance to you in determining
21 whether the government has satisfied its burden of
22 proof on each essential element of the 19 crimes
23 charged in this indictment.

24 As you know, the burden of proof never shifts,
25 and each defendant is afforded the presumption of

1 innocence. And you are to consider each defendant
2 separately on each count of the indictment, and you
3 are to consider each defendant on your analysis
4 individually each count, each defendant, of the
5 essential elements and whether all of them for each
6 count, each defendant has been proven beyond a
7 reasonable doubt.

8 A lot has gone on in this case. You've heard a
9 lot of testimony from witnesses. Thirty by our
10 count. And I suspect that your eyes have been
11 opened more than once, and you've learned a great
12 deal, but all of that now has to be like every life
13 experience, applied to the practicalities of the
14 task ahead, and that is for you to decide this case
15 unanimously by verdict on each of the particular
16 counts in this particular indictment.

17 So soon you're going to be undertaking that
18 duty that you affirmatively by oath represented
19 that you were willing to do in an important matter
20 in our justice system, and that's deciding this
21 particular case.

22 What happens next are three closing arguments,
23 if you will. And the procedure is very much like
24 when we started this case. The government has the
25 opportunity to open with its closing argument

1 first, and that's because it technically brought
2 this case against the two defendants that you have
3 come to know as Tonawanda Coke Corporation and Mark
4 Kamholz.

5 We will take a break, brief, after the
6 government's closing argument. Then we will resume
7 with the two defense closing arguments. They will
8 be separated by a break, a short break. I think
9 the order will be Mr. Linsin, then followed by
10 Mr. Personius. And then if everything comports
11 with the rules, the government will have the
12 opportunity to make what's called a rebuttal
13 argument. And that would be -- I think the initial
14 argument will be by Mr. Mango, and then
15 Mr. Piaggione will wrap up the rebuttal argument
16 for the government.

17 So that's what you have to look forward to.
18 I'm confident that we can accomplish that this
19 afternoon. Once that is done, then I will give you
20 the balance of the law that you need to apply to
21 decide this case. So, you know, I know you
22 comprehend and understand how this all works now,
23 and you in a sense have become experts in the trial
24 process, and that's a good and positive thing.

25 You've heard me emphasize time and time again

1 only the evidence or the lack of evidence decides
2 the case. Now you also heard me say that the
3 closing arguments will be very different from the
4 opening statements. And they will be designed to
5 persuade you -- that's the attorney function in
6 every case -- persuade you from the evidence or the
7 lack of evidence whether the government has
8 satisfied its burden beyond a reasonable doubt.
9 But here's the caveat, and you know what I'm
10 getting to. What the lawyers say and have said
11 throughout out the trial, what? None of that is
12 evidence. The evidence was produced by the
13 witnesses, the exhibits, and the stipulations.

14 You have your notebooks. You can take notes if
15 you choose to, but if you do, it's with the
16 expressed understanding that it's a guide. It's
17 not evidence for you to consider when you enter
18 your deliberations.

19 Okay. Are you ready? All right.

20 That being the case, Mr. Mango, I believe you
21 are ready to start. And you may sum for purposes
22 of this case.

23 MR. MANGO: Thank you, your Honor.

24 THE COURT: You're welcome.

25 MR. MANGO: May I proceed?

1 THE COURT: You may.

2 MR. MANGO: To comply or to deceive, that
3 is the question. Now that question which I've
4 borrowed from Shakespeare in a modified form really
5 sums up the issues in this case. On several
6 occasions defendant Tonawanda Coke Corporation and
7 its manager of environmental control, defendant
8 Mark Kamholz, faced that simple question and had to
9 decide whether they were going to comply with
10 environmental laws designed to protect the very air
11 we breathe and the ground we walk on from dangerous
12 toxic and hazardous pollutants, or whether they
13 were going to engage in deception to avoid
14 compliance to save a buck. And as the evidence has
15 established during the course of this trial, time
16 and again the defendants chose to deceive, not
17 comply, all in an attempt to put profit ahead of
18 all else.

19 Now, before we start getting into the counts of
20 the indictment, I'd like to just give you one
21 example of what I'm talking about. You've heard a
22 lot of testimony in this case, and you heard
23 testimony regarding something called a battery
24 flare stack. I want to start there, because that
25 puts, in the government's view, everything into

1 perspective.

2 You heard that this is a device used during
3 times of emergency to vent the battery, to vent
4 this coke oven gas, which contains benzene,
5 naphthalene, sulphur, to vent it so the battery
6 doesn't explode.

7 And as I go through my closing you're going see
8 a number of slides here.

9 This is the battery flare stack as testified
10 to. Now to really put this into context and how
11 this relates to this case, there's some
12 correspondence that you all saw. In 1993, October,
13 Defendant Kamholz sends a letter to the EPA, 1993,
14 and he says, I'm aware there's this new law. I've
15 got to have a -- Tonawanda Coke has to have a
16 battery flare stack on the system and, in fact,
17 we've got to install it by March 31st of 1994.

18 He proposes some alternative option of using
19 some collection of stand pipes to manually open the
20 devices during an emergency. And he sends this
21 into the EPA requesting an exemption from this rule
22 that says you have to have a battery flare stack.

23 EPA responds back. December 30th of 1993,
24 couple months goes by. They in essence say we've
25 evaluated your request. It's denied. We don't

1 believe that it would adequately destroy the amount
2 of coke oven gas going into the atmosphere. Coke
3 oven gas going into the atmosphere.

4 On the third page of that document, EPA
5 specifically tells him -- this is in the conclusory
6 paragraph here. "A manually operated system would
7 not be as reliable as a flare system for these
8 brief venting episodes. An automatic system is
9 much faster than using battery workers to vent the
10 battery."

11 We're going to go through a lot of language
12 that the government believes is very clear in this
13 case and clear in the requirements it imposed on
14 Defendant Kamholz and Defendant Tonawanda Coke
15 Corporation.

16 Now, in light of that language, we've heard
17 testimony from Anthony Brossack, from Gerry Priamo
18 about this battery flare stack. You may have been
19 wondering at the time, how does this relate, why
20 are we even talking about this? The Judge read me
21 the indictment before we started -- or the counts
22 of the indictment. It relates because within at
23 most a year, because those witnesses said it was
24 '94, '95 that the pilot light went out, that the
25 automatic system that was in place was not in

1 place.

2 So within a year Defendant Kamholz removes that
3 natural gas and those witnesses told you why.
4 Because he said it was too expensive. Natural gas
5 is too expensive, and in response the witnesses say
6 well, how are we supposed to light this? What are
7 we supposed to do? And that man's response was
8 grab one of those brooms you use to brush the
9 battery top, light it on fire, throw it up, ignite
10 the battery flare stack. It's exactly what EPA
11 said don't do. Exactly. Do not -- use an
12 automatic system. A manual system doesn't work.
13 And you're not approved to use it. That's, in the
14 government's view, uncontradicted testimony from
15 the witnesses who took the stand. All for money
16 because natural gas was too expensive.

17 Now, you've heard the Judge talk obviously with
18 instructions yesterday and this morning, that
19 whatever I say here today is not evidence.
20 Whatever Mr. Linsin, whatever Mr. Personius says,
21 that's not evidence. You've got the evidence.
22 We're just trying to put a spin on the evidence.
23 Okay. You've got it. And likewise aside from the
24 closings, the openings that you heard, those aren't
25 evidence.

1 But it's my practice I like to take notes
2 during opening. I like to see what the defense
3 counsel is going to say or what they believe
4 they're going to show in their case.

5 And again my recollection is not determinate --
6 determines your recollection. It's what you recall
7 during openings that matters. But I recall
8 Mr. Linsin saying something to the effect of money
9 is no issue. This is a corporation. You're going
10 hear the baffles cost \$125,000 to install, which
11 you did. You heard that stipulation. Baffles in
12 each tower cost \$125,000. That's a lot of money.
13 But he said money's no issue.

14 But I submit, ladies and gentlemen, what the
15 evidence does show in this case is that money was
16 an issue. Money drove the corporation and
17 Defendant Kamholz into this deception. And you've
18 now got in evidence this Government Exhibit 120,
19 which is the business plan for the fiscal year
20 ending 2009.

21 And what better document than a confidential
22 and proprietary document of the own corporation?
23 Confidential and proprietary. This is for us only,
24 except when EPA criminal agents go in and take it.
25 And they did. And on page 16 under weaknesses,

1 significant environmental pressures include ongoing
2 compliance with local, state, and federal emissions
3 regulations. Eighteen, under risks, environmental
4 risks. Economic, compliance with environmental
5 mandates often involves substantial expenditures.
6 This is their own document. They wrote this
7 document. Money is an issue. It's clearly an
8 issue. You wouldn't put it in a business document
9 if money is of no concern to compliance.

10 Let's switch gears now, talk about the Clean
11 Air Act and the Resource Conservation and Recovery
12 Act. We spent a good three days in the beginning
13 with the testimony of Mr. Carlacci going through
14 the Clean Air Act, going through the self-reporting
15 nature of the Clean Air Act, going through the
16 requirements that are on corporations like the
17 Tonawanda Coke Corporation, going through the
18 requirements that are on the point of contact,
19 Mr. Kamholz. And I submit as we go through these
20 accounts, ladies and gentlemen, the evidence is
21 consistent with the defendants' attempts to deceive
22 inspectors and manipulate the regulatory scheme.
23 Manipulate it for their own benefit.

24 You're going to hear some common terms when
25 Chief Judge Skretny gives you the instructions

1 about the Clean Air Act. You're going hear about
2 what it means to be an owner or operator, a
3 required element in the Clean Air Act charges. The
4 defendants need to be owners or operators of a
5 stationary source of air pollution.

6 An owner or operator just simply means,
7 obviously, someone who owns the company, which the
8 corporation does. But in the case of Defendant
9 Kamholz it includes anyone who controls or
10 supervises the stationary source.

11 There's now, as the Judge mentioned, 30
12 witnesses who've testified, a number of which
13 talked about Defendant Kamholz's responsibilities
14 at the corporation. You've got a number of
15 documents where he signed -- he signed his name --
16 we're going to go through one in a minute -- where
17 he certifies that everything is true, accurate, and
18 complete. He is the one who is supervising, who's
19 in control of this stationary source.

20 I want to start my discussion of the counts
21 with Count 6 through 10 of the indictment. And if
22 you remember, that -- those counts of the
23 indictment relate to quench tower number 1, that's
24 the west quench tower, deals with condition 96 in
25 the Title V permit. And the time period in play is

1 July 29th of 2005, which, when you get the
2 indictment -- it's not evidence -- but look at it.
3 That's exactly five years to the day before the
4 indictment is returned, to December 31st of 2009.
5 And December 31st of 2009 we know from a letter in
6 evidence, Government Exhibit 19.16, that baffles
7 were reinstalled in this quench tower number 1 in
8 January. That brings us all the way through
9 December.

10 And you saw a picture of the quench tower,
11 number one tower, which was taken during the
12 execution of the criminal search warrant. And
13 it's -- it's the government's position that there
14 really is no dispute that this quench tower did not
15 have baffles going back at least since 1983, 1984.
16 And obviously you've heard about that. We'll talk
17 about that in a minute.

18 You saw from the inside on that day, on
19 December 1st, 2009, during the search warrant,
20 there were no baffles in the quench tower. Again,
21 it's the government's position we're not here to
22 talk about whether there were or were not baffles
23 in the quench tower.

24 But we are here to talk about the defendants'
25 deception towards the regulatory agencies involved,

1 which begins for this count on September 19th of
2 1983, where he says, and he gives the principle
3 reason for why he's asking not to have baffles in
4 that quench tower, cost too much.

5 So, a month ago when you heard it, money is not
6 an issue, and in 1983 money was an issue. The
7 physical size of the exit would require very
8 significant sums of capital to produce the
9 60 percent control.

10 The next page, he ends the letter by saying he
11 believes that quench tower number 1, the lack of
12 baffles, is de minimus. We're going to talk about
13 de minimus. It's a word now when we fast forward
14 into 2009 that comes back into play.

15 So, you've learned DEC granted that exemption
16 March 14th, 1984. This is Government
17 Exhibit 19.17. They specifically say, "Please note
18 the condition on the operating certificate that
19 limit the use of the quench tower to less than
20 10 percent of the time." You have that, that Air
21 100. I'm not going to go through it. I would be
22 here for hours if I tried to go through everything.
23 But you have that Air 100. You're going to see it
24 in the deliberating room, and on the bottom it will
25 say not to be used more than 10 percent -- or ten

1 percent or more of the time.

2 Now fast forward to 1997, December of 1997.

3 Again, based on what you heard from Mr. Carlacci
4 and Mr. Sitzman, this whole new regulatory world
5 goes into play, that's Title V. That's the Clean
6 Air Act. In December of 1997 Defendant Kamholz is
7 responsible for applying for the Title V permit.
8 And no doubt -- no doubt Defendant Kamholz included
9 in his application the request to continue this
10 exemption. And now you've seen that the draft
11 permit got issued. The exemption wasn't in it.

12 Tonawanda Coke, Defendant Kamholz commented on that
13 draft permit. No mention of quench tower number 1.

14 Likewise in 2006 there is a renewal application
15 submitted. That's Government Exhibit 18.06.

16 There's nothing in that regarding the exemption.
17 And the issue in play in Count 6 to 10 really is
18 that exemption. Because you heard DEC witnesses
19 Mr. Sitzman, Mr. Carlacci, say that our view of
20 condition 96 of the Title V permit would
21 incorporate this exemption.

22 So your duty is to think about well, did they
23 use this tower 10 percent or more of the time
24 during the relevant period, 2005 to 2009? And
25 you've heard from a number of witnesses now on that

1 point that during the relevant time, those
2 witnesses who did work at Tonawanda Coke said that
3 both towers were used in an alternating fashion.

4 If you remember the testimony of Frank
5 Gonzalez, the battery foreman or battery
6 supervisor, he testified. Even under his math with
7 eight oven pushes in a shift, the west tower is
8 used one to two times. Even one time out of eight
9 pushes that's more than 10 percent of the time.

10 You heard the testimony of Sean Hoffmann and
11 Dan Heukrath. I'm not going to pretend that didn't
12 happen, where they testified that there was a
13 period of time that the west quench tower was
14 closed off, it was out of service. And you heard
15 from other witnesses about the length of that time.
16 And I submit to you the testimony was somewhere
17 between six months to two years.

18 But the indictment charges five years, five
19 counts, five years. And, in fact, it's my
20 recollection that both Mr. Heukrath and
21 Mr. Hoffmann said that sometime in 2008 the west
22 tower came back online. And from that point on it
23 was used in an alternating fashion. In fact,
24 Mr. Hoffmann said that the east tower, which we'll
25 talk about in a second, that was down. He gave

1 dates, again in my recollection -- it's your
2 recollection that controls of the testimony --
3 January to May of 2008. The east tower was down
4 completely. Quench tower number 1 used all the
5 time. They got to quench the coke. They got to go
6 somewhere. They got to pour water on it.

7 Let's move to the east tower, number 2 tower.
8 That relates to Counts 11 through 15 of the
9 indictment. And those charge the defendants with
10 using that tower. That tower had no exemption.
11 That tower had to have baffles a hundred percent of
12 the time. All the time.

13 When that tower from 2005 you look, the charge
14 starts July 29th, 2005, five years prior to the day
15 of the indictment, up until November 15th of 2009.
16 If you remember there's now an exhibit in evidence,
17 that's Exhibit 19.15, where Tonawanda Coke sends in
18 a letter, and says we've reinstalled baffles in
19 this tower.

20 You saw a photograph of this tower. Again,
21 taken during the criminal search warrant. And as
22 you know, the story begins in 1996. Because in
23 1996 that is when Defendant Kamholz, again, began
24 his scheme to deceive the regulatory agency.
25 Because in that letter he talks about how he wants

1 to lower the height of the tower. That's it. We
2 anticipate operating number 2 quench station in its
3 modified form, and request your concurrence to this
4 modification. The word "baffles" doesn't appear
5 anywhere in this letter. It's no where.

6 So in response -- again, you've seen this.
7 Government Exhibit 19.12 -- DEC sends a letter
8 back. It's very clear. It should be noted that
9 Part 214.5(a) -- that's the New York Codes Rules
10 and Regulations, which you've heard of -- says
11 explicitly all wet quench towers have to have
12 baffles. We're reminding you of that. That's it.

13 So at that point, ladies and gentlemen, that
14 point in time, 1996, '97, they had a choice, to
15 comply with the law or to deceive. And from what
16 we've heard, we know the choice was to deceive.

17 And I say defendants at this point. I just
18 want to briefly touch on this. You've heard this.
19 You've heard this from the Judge yesterday about
20 responsible corporate officer, that based on his
21 duties he was the person that was the responsible
22 person for this facility. It's similar to this
23 owner-operator definition.

24 You also heard about the definition of
25 corporate responsibility. That corporations are --

1 can be liable for the actions of their employees.
2 And that's how we have both Defendant Kamholz and
3 the corporation involved in this case.

4 And, again, with this tower, my notes suggest
5 that it was mentioned during opening by Mr. Linsin,
6 I suggest there's really no dispute whether this
7 tower had baffles or not. I believe there's no
8 dispute it did not have baffles. My notes say that
9 Mr. Linsin mentioned that during opening. And
10 you've now heard the testimony from a number of
11 witnesses. There were never baffles in this tower
12 after '96, '97 time period. Mr. Priamo mentioned
13 that.

14 I don't want to go through the testimony about
15 baffles in or out. What I want to focus on is Gary
16 Foersch, the defense witness. The person called by
17 the defense in their case.

18 My notes, again, suggest that Mr. Linsin said
19 something to the effect of you're going hear from a
20 DEC inspector, and I would presume that's
21 Mr. Foersch, who was out there from 1996 to 2009,
22 knew there were no baffles in quench tower number
23 2, knew it was a violation, but never wrote up the
24 corporation, never said anything.

25 Okay. Now you've heard his testimony. That's

1 not what he said. He didn't say that at all. He
2 stated that he brought the lack of baffles or
3 missing baffles, he couldn't remember, he brought
4 that up during one of his inspections because one
5 time he decided to go into this dangerous place as
6 he testified to, where there's electric rails,
7 where there is water pouring out possibility. You
8 climb down a little slope, he looked in, and he
9 said there's problem there.

10 Defendant Kamholz, you know, Part 214.5
11 remember that? That requires baffles. Okay.
12 There was nothing at that point.

13 Mr. Foersch testified Mr. Kamholz didn't say
14 well, you know, the upward velocity. Don't
15 really -- this tower, should ignore, you know,
16 baffles. There was none of that. It was just an
17 acknowledgment. Yup, okay.

18 So again, I'm trying to focus on all these
19 choices, these times when that decision to comply
20 or deceive came up. Here's another chance. He had
21 the choice. He could have complied. He could have
22 put the baffles in the tower, but he chose to
23 deceive. And then you also heard testimony from
24 Mr. Foersch that not only did he raise that the
25 year later when he went back during his full

1 compliance inspection, he didn't look in the tower,
2 but as he's walking out, finished with his
3 inspection, he says something to the effect, hey,
4 did you put baffles in that tower? And again there
5 was that choice, that chance. Come clean.

6 Defendant Kamholz could have said well, you
7 know what, it's too cost prohibitive, we haven't
8 had a chance to do it yet. He could have said
9 that. Mr. Foersch, said yes, we put them in. Yes,
10 he made that choice. He chose to deceive. He
11 chose in this case to roll the dice, to roll the
12 dice that DEC was never going to go back there and
13 look.

14 You may hear an argument, I expect you'll hear
15 an argument that well, Mr. Foersch, he didn't
16 really believe Defendant Kamholz at that time. Who
17 cares? What does that matter? Everything that was
18 communicated, the statements or conduct which
19 you're going hear about -- I'm using these terms
20 deliberately -- because you're going to hear about
21 this term entrapment by estoppel. I have it under
22 something else I want to talk about.

23 These statements or conduct that is sent over
24 to the defendants is you got to have baffles, and
25 did you put them in. That's it. It wasn't hey, I

1 really don't believe you, but it's okay. That
2 didn't happen. So the fact that Mr. Foersch either
3 didn't follow up or didn't believe Defendant
4 Kamholz, it's irrelevant. It doesn't matter.

5 Now, there's an interesting thing that happened
6 in April of 2009. And we're going to talk about
7 that as well. That's that EPA -- joint EPA/DEC
8 inspection. And we'll get there, we'll talk about
9 why this inspection comes up. But at that point
10 quench tower number 2 becomes an issue. You heard
11 it from Mr. Sitzman.

12 He finds out there's no baffles in the tower.
13 He talks to Defendant Kamholz. He says, hey,
14 what's going on? You're supposed to have baffles.
15 Remember those letters? Yeah, I remember those
16 letters. Did he say, well, Gary told me I could?
17 No. No, he didn't say anything. He didn't say
18 anything. Think about that.

19 I mean, my own daughter does it to me and my
20 wife. If I tell her something but my wife tells
21 her something else, well daddy told me I could do
22 it. I got that this weekend actually. That's
23 ingrained in us since we're little. If somebody
24 tells you it's okay to do something, and then
25 somebody else comes along and says why did you do

1 this? It's common sense. You're expected to use
2 your common sense.

3 Similar to the April of 2009 inspection and any
4 lack of response by Defendant Kamholz. We have
5 this letter in evidence, Government Exhibit 126,
6 which is the request for information sent by the
7 EPA following this inspection. Significant
8 document which we'll talk about in another context.
9 And says, you know, Defendant Kamholz, we really
10 need some more information about your facility.
11 They send it to him, the owner-operator. They
12 specifically ask about baffles.

13 It doesn't get any clearer than 8(a). State
14 whether the quench towers have any baffles. If
15 your answer is no, explain why not. Another
16 chance. Another chance for him to say -- to make
17 that choice, that compliance choice. But instead
18 he chose to deceive. He had the chance again to
19 say, you know what, Gary told me I could do it. He
20 didn't do that. Here's the letter that he sent
21 back.

22 In the section -- this is the certification I
23 wanted to talk about. In the letter he sends back
24 he says I believe that the submitted information is
25 true, accurate, and complete, and that all

1 documents submitted with this response are complete
2 and authentic unless otherwise indicated.

3 He's on the hook. It goes on to say there's
4 significant penalties, including imprisonment. He
5 knows what he's doing. And he says the quench
6 towers are not baffled. They're not traditional
7 quench towers. They're short. The upward
8 velocity, we've heard that. And we heard about
9 foundry coke. This is the chance to say Gary told
10 me I could do it. He doesn't do that. And the
11 reason is because it never happened.

12 Gary never said, Gary Foersch I'm talking
13 about, never said you can operate without baffles
14 in that tower. You heard his testimony.

15 Okay. Let's move on to the bleeder valve.
16 These are Counts 1 through 5 of the indictment.
17 And those counts charge the defendants with
18 operating an unpermitted emission source in
19 violation of their Title V permit. That's
20 condition four. We went through it, again, three
21 days of testimony with Mr. Carlacci, I think two
22 days of testimony with Mr. Sitzman. I think you've
23 got it. I think you know what we're talking about.

24 And we've also heard this called the bleeder
25 valve, the pressure release valve. It's in

1 by-products. And a period of time, again
2 July 29th, 2005, five years from the time of
3 indictment, up to December 30th of 2009. Because
4 we know or you've heard from the testimony of
5 Mr. Cahill that that bleeder was taken out of
6 service in March of 2010. So it's -- so the charge
7 brings it all the way up to the end of December.
8 And you've seen a number of photographs depicting
9 this bleeder.

10 I want to focus on this one, Government
11 Exhibit 50, which you heard testimony of. You saw
12 people point it out, there it is. Does it appear
13 to be releasing? That's your call. I don't know
14 if there was testimony or not on whether it was
15 releasing, but you could look at that. You could
16 use your common sense.

17 A number of witnesses testified on this bleeder
18 valve. They testified about during reversals gas
19 would back up in the coke oven. It wouldn't flow
20 to the coke oven. Pressure in the line would
21 increase. This device was set to relief that
22 pressure. You heard about the general set point of
23 the bleeder from 80 to 100.

24 Witness after witness testified we set it at 80
25 to 100, somewhere in that ballpark. And when the

1 pressure would go above that, a signal would get
2 transmitted to the valve, it would open, coke oven
3 gas would go into the atmosphere.

4 You learned about where the set point was in
5 this green shack just below it, that changes to the
6 set point weren't made that often. You heard
7 testimony from a number of witnesses on that. They
8 didn't adjust this that often. And it would
9 generally release during reversals, and when it
10 would you heard it would go anywhere from five to
11 30 seconds blowing coke oven gas into the
12 atmosphere. Some times it would be longer.

13 You heard from a witness who was actually
14 working when it caught fire. You've now had an
15 entry you see in the log book that's included on
16 that summary chart -- we'll get to that in a
17 minute -- that caught on fire in 2008. And the
18 result of that was a 10-foot high flame, like a
19 blow torch into the air.

20 Now, you also heard testimony from Mr. Heukrath
21 and I believe from Mr. Cahill, it's my
22 recollection, that at some point in the 1980s the
23 bleeder was set there. It was in a different
24 location.

25 There's really three main elements of these

1 counts that I want to discuss, that the defendants
2 operated this bleeder in violation of a permit
3 condition, and knowingly. So operation in
4 violation of a permit condition and knowingly. So
5 at the close of the government's case in chief,
6 that was before the defense started their case, you
7 heard from Special Agent Conway. He presented this
8 summary chart which included a summary of all the
9 by-products operator log books and the bleeder
10 charts. And certainly there's no dispute that this
11 chart is only as good as the documents that it
12 relies upon. And that there's clear discrepancies
13 in the log book. Bleeder being lowered to 94, with
14 the setting before it it was at 90.

15 But the important -- there's important parts of
16 this log book you have to take away. That except
17 for the last entry and one entry in February
18 of 2008, it was consistently set at 80 to 100
19 centimeters. Highest setting ever was recorded on
20 May 22, 2009, which occurred after the April
21 of 2009 inspection. When we've heard now that
22 defendants were asked to raise this, this chart
23 bears that out.

24 Now, with the discrepancies in this chart, even
25 if we just limit ourselves to those three days that

1 I have bracketed there that we have bleeder charts
2 for, you saw all those circular bleeder charts.
3 Just even focusing on those three days, March 2nd,
4 March 3rd, and May 22nd, well, you saw Government
5 Exhibit 203 in evidence, where on March 2nd of 2009
6 it was set at 94 and based on that bleeder chart,
7 there were 49 releases, just over every half hour.

8 The next day it was raised to 100. There's
9 actually 51 releases. If we go to the May 22nd,
10 the next entry, which says raised to 110, there is
11 48 again, consistent with every half hour during
12 reversals. This evidence coupled with the
13 testimony of the witnesses you've heard, a number
14 of them, this bleeder would release frequently.

15 In fact, you heard from near the end of the
16 government's case Dan Heukrath, who said
17 between 2005 and 2009 he saw this release thousands
18 of times. Thousands. So I submit to you that
19 based on that evidence, there's no doubt that the
20 defendants operated this bleeder valve.

21 Now, violation of a condition of the permit.
22 This deals with condition number four. You're
23 going to hear some terms during the definitions
24 when you're instructed on the law about emission
25 source. I don't know if you remember that

1 testimony, emission source versus emission point,
2 construction, modification, a process, what all
3 that means. But what is clear, I would submit
4 based on the testimony, is that you heard this
5 bleeder is an apparatus. Al Carlacci testified to
6 that. Larry Sitzman testified to that. And under
7 the definitions you're going to get from the Judge,
8 an emission source is any apparatus or contrivance
9 or equipment that can cause emissions into the air.
10 That's exactly what we have. There it is. There's
11 the apparatus.

12 Now, the last element of these counts I want to
13 talk about is knowingly, because you've got to show
14 that the defendants acted knowingly. You're going
15 to hear about what knowingly means in the Clean Air
16 Act. But it doesn't get any more knowingly than if
17 you recall the testimony of Gerry Priamo, who said
18 he had conversation with Defendant Kamholz 15 to 20
19 years ago in the vicinity of this very apparatus,
20 and says hey, Defendant Kamholz, is it legal to
21 bleed gas here like this? Does it need to be lit?
22 The defendant had a choice. He chose to deceive
23 his own employees and said it's legal, don't worry
24 about it.

25 Same with Anthony Brossack. You heard from

1 him. He had a conversation more regarding the
2 condensate that was coming out of this. Again, a
3 long time ago. There was condensate coming out,
4 and he asked, hey, is the bleeder all right to do
5 this? And Defendant Kamholz's response was yeah,
6 it's supposed to do that.

7 And finally, in terms of knowingly, we've got
8 Pat Cahill's testimony, which I want to hold on and
9 talk about that in a moment.

10 Now, I expect you're going to hear about this
11 entrapment by estoppel defense. It's really a
12 defense, and it's a defense the defendants have to
13 prove. They have to prove it. And you heard some
14 testimony regarding this document, Government
15 Exhibit 131, this HAPS study. And defendants have
16 challenged some of the government witnesses arguing
17 that the report provided notice to the DEC. And we
18 saw this chart with the coke oven gas system, a
19 pressure relief valve, listed one, that somehow
20 this was notice.

21 I have no other argument than this is complete
22 nonsense. You heard about the process to make
23 notice. It doesn't include a reference which in
24 the footnotes itself identifies this as a leaking
25 valve based on the emission factors that you heard

1 from Mr. Sitzman. But moreover, does it describe
2 where it is?

3 This coke oven gas system, you've now seen
4 charts, the length of these pipes. It doesn't say
5 where it is. Does it say what it looks like? No.
6 And again, how often it releases? Well, the
7 footnote says it doesn't release that often. It's
8 a leaking pipe. And then on the next page, the
9 very important question, the most important
10 question out of this, how much benzene is coming
11 out of it? A big zero.

12 So this, ladies and gentlemen, this tells you
13 nothing. Nothing. This can't be notice. If this
14 is notice, think about when you -- it's almost
15 middle of April. We've got to submit our taxes,
16 got to make an accounting of how much income you've
17 earned, put it on a 1040, send it in to the IRS.
18 You say how much income you've earned. You're
19 giving them notice of how much tax due and owing
20 you have based on the amount of income you have.

21 Now think about instead, you send -- you
22 electronically file your -- your income statement,
23 your tax return. You electronically file it. I
24 expect that's what most of us do now. But at the
25 same time you write a letter out to the IRS, oh, by

1 the way, dear IRS, I have another job. You put it
2 in the mail and you send it in. Would that be
3 notice?

4 What if in that same letter on the most
5 important question it says I earned zero income.
6 Think about it that way. That letter would be
7 meaningless. It's nonsense. That this could be
8 notice to the DEC is nonsense.

9 Proper notice of an emission source is not
10 burying it in some unintelligible chart that you
11 heard testimony of really isn't reliable anyways.
12 This is not notice.

13 Now you've also heard testimony from the
14 defendants that this bleeder was open and obvious.
15 That it wasn't shrouded in a veil I think was --
16 was the -- one of the questions. No, there was no
17 veil draped around it.

18 So, in essence, what they're telling you, what
19 they're going to imply I expect in closing is that
20 well, although DEC didn't catch us, they should
21 have. They should have, because we didn't put a
22 veil around this. We didn't hide it. We didn't
23 drape a sheet over it every time they showed up.

24 But when you think about that argument, you got
25 to think, is that how the law works? Think for a

1 moment about a serial bank robber who alludes
2 detection by police on a number of occasions, robs
3 a number of banks, but then finally is caught. On
4 one of the final attempts he's caught. And then
5 there's evidence produced during maybe a search of
6 his apartment of these earlier bank robberies.
7 Does the fact that the police missed it somehow
8 absolve that bank robber of those earlier crimes?

9 Think about this. How about in the Ponzi
10 scheme. Probably heard Bernie Madoff in the news
11 in the past. Think about someone is operating a
12 Ponzie scheme, and it goes undetected by the agency
13 that's supposed to detect it, which is the
14 Securities and Exchange Commission. Even though
15 they should have caught on, the tell-tail signs
16 were there, they should have caught it. If the SEC
17 later determines that this is truly a Ponzie
18 scheme, does that mean they're precluded from
19 taking any action? The answer is no. The law
20 simply does not work that way.

21 This is not monopoly. There's
22 no-get-out-of-jail-free-because-they-missed-it
23 card. That doesn't apply. Even if you want to
24 conclude that DEC missed it, that's fine. I can't
25 argue with that. But in the context of this case,

1 and in the entrapment by estoppel defense that the
2 Judge is going to tell you about, you've got to
3 think to yourself it really has no bearing.

4 Because for this entrapment by estoppel defense
5 to apply, which the defendants have to prove,
6 that -- they have to show that the defendants --
7 I'm sorry, that the government caused the
8 defendants to commit the crimes by leading the
9 defendants to reasonably believe they could commit
10 the crimes. Reasonably believe. Defendants must
11 show they relied on statements or conduct of the
12 defendant, and, very importantly, and they must
13 show that they reasonably disclosed this conduct at
14 or time [sic] the authorization from the
15 government. That's a very important statement.

16 You heard this bleeder's been around for years,
17 since the '80s. That's why I say the 2003 report
18 is nonsense. Because under an entrapment by
19 estoppel, back in the '80s when they were using it,
20 they've got to give notice then. They've got to
21 tell the government, hey, we're going to be using
22 this to vent coke oven gas in the atmosphere. Not
23 decades later.

24 Those are the Clean Air Act charges in the
25 indictment. And I submit to you that based on the

1 evidence presented, you should find the defendants
2 guilty of all those charges.

3 Now we're not done there. We've got to talk
4 about the RCRA charges. And as you heard with the
5 government's last witness, the government attempted
6 to present you and through Mr. Flax his opinion as
7 to the concepts relevant to Counts 17 to 19. And
8 with Count 17 we're talking about storage, storage
9 of a RCRA hazardous waste. And I submit to you --
10 again, I'm trying to focus on what the government
11 believes are really the key issues.

12 I submit to you that the only real issue in
13 dispute here with Count 17, which you heard from
14 Miss Williams who testified, Mr. Flax,
15 Mr. Strickland is whether the defendants actively
16 managed this material. Did they actively manage
17 it?

18 The Judge is going to give you a very
19 straightforward definition of what active
20 management means. And I expect it's going to
21 include something to the effect of disturbing
22 accumulated waste. Disturbing. As you evaluate
23 that language, "disturbing accumulated waste",
24 you've got to think about the tanks and the
25 material around the tanks on the ground.

1 Let's start with the tank to the east. It's
2 Government's Exhibit 105.40, which has been
3 stipulated, if you remember the stipulation, was
4 taken on April 21st of 2007. So 2007 there's two
5 tanks standing.

6 Moving into July of 2008 one tank is down.
7 Moving into June of 2009, from the testimony of
8 Mr. Corbett who was there who took this photo,
9 that's the tank. If you go back where the tip of
10 that arrow is, I don't know if you see the piece of
11 metal sticking up that's almost like a right angle.
12 I submit to you you see it in that photograph too.
13 Then you've got a stipulated photograph from
14 September 10 of 2009. This is Government
15 Exhibit 136.11. This is from the sampling event.

16 There can be no doubt, ladies and gentlemen,
17 that what you've seen in these photographs, the
18 ground around these tanks, this tank in particular,
19 has been actively managed. You've got to think
20 about the testimony you heard. The witnesses who
21 testified they drove over the material with heavy
22 equipment. They disturbed it. It's very simple.

23 RCRA may sound complex, but when you think
24 about the definitions the Judge is going to give
25 you, they disturbed it. They drove over it. They

1 poured coke breeze on it. They dumped more coke
2 breeze on it that caused it to move. They drove
3 over it with heavy equipment that caused it to
4 move. Material flowed out of this tank, which,
5 part of the definition you're going to hear about
6 active management is whether additional material
7 comes on top of it.

8 Let's look at the tank on the west, again,
9 stipulated April 21st, 2007. The time of the fire
10 July of 2008, tank still standing. Sometime
11 between July of 2008 and June of 2009 when
12 Mr. Corbett's there, this tank comes down. Then in
13 September when they're doing sampling there,
14 stipulated photo 136.04, sampling of tank on the
15 left. Tank to the west. There's no question in
16 these photographs that the defendants actively
17 managed the ground around the tank on the west.

18 You've got evidence which is apparent from
19 these photographs -- you'll have a number of
20 photographs to look at that -- that there's fresh
21 spills. This material is flowing out. And you
22 also have evidence now that this was toxic for
23 benzene. Toxic and remained on the ground.

24 Let's go back to this chart and I'll talk
25 briefly about Counts 18 and 19, that's the disposal

1 of a RCRA hazardous waste. And both of those, if
2 you really simplify all the testimony, involve
3 mixing somehow with coal on the ground. Well, I'll
4 talk about ground in a minute.

5 So, that seems to be -- again, I'm trying to
6 I'm trying to clarify this -- seems to be in the
7 government's view the key issue, whether that
8 mixing was appropriate in the coal piles on the
9 ground.

10 So you heard about this ground, defense exam of
11 the government's witnesses as to what does ground
12 mean. Does the fact that there's coal, years and
13 years of coal accumulated on the ground, does that
14 mean it's not the ground? No. You've got to use
15 your common sense. The fact that there's a layer
16 of coal doesn't mean the coal is not the ground.
17 You heard testimony about the ground is the surface
18 of the earth.

19 You probably walked across some street to get
20 here, probably Delaware, maybe Niagara Square,
21 which I guess would be Delaware, so it's all
22 Delaware, unless you maybe walked across Niagara
23 Street and came on the sidewalk. At some point you
24 walked across a street today. And at that point if
25 somebody asked you where you were walking, do you

1 think you have to do mental gymnastics to say well,
2 I'm really walking on blacktop, that's on top of
3 gravel, that's on top of soil, which is on top of
4 the ground. That makes no sense. You don't have
5 to do that. You walked on the ground. That's
6 where you walked. The surface of the earth, that's
7 where the coal is.

8 All right. To come to terms with this mixing
9 on the ground, you've got to listen to the
10 definitions the Judge is going to give you about
11 disposal under RCRA, what it means, disposal. You
12 heard some testimony from the experts. And land
13 disposal. And I submit when you hear those, again,
14 it's not going to be difficult to tackle these
15 issues. RCRA is not that complicated when you get
16 very clear definitions. And those definitions are,
17 for both of those, simply if you place something on
18 the land so that it may enter the environment,
19 that's the key word, may enter the environment,
20 that's disposal. That's land disposal.

21 You don't have to be worried about whether it
22 actually did enter the environment. It may. It
23 may enter the environment. You've heard that
24 there's no -- no way -- there was no containment
25 out in the coal field to stop this K087 waste and

1 this D018 waste from getting flushed out of the
2 coal field.

3 And you heard about a direct surface water
4 connection to the Niagara River. Runoff, snow melt
5 comes off the coal piles, runs down ditches, heads
6 out to the Niagara River. It may enter the
7 environment.

8 Now, you heard from a number of witnesses -- I
9 guess maybe part of it was the parties made RCRA a
10 little complicated. The government called two
11 experts, defense called an expert, we called a
12 rebuttal expert. But you also heard -- again, this
13 is my notes from opening -- Mr. Linsin talked about
14 this other expert you may hear from, a Steven
15 Johnson, who would talk about RCRA and give you
16 some opinions. We didn't hear from him.

17 So all you have from the defense is the
18 testimony of Miss Williams, a witness who's never
19 done a RCRA inspection in her life, a witness who's
20 never been to the Tonawanda Coke Corporation, so
21 she's never physically seen the coal field, a
22 witness who, according to my notes during direct,
23 said she spent about 200 hours working on this
24 case. And on cross-examination with Mr. Piaggione
25 said she billed \$475 an hour, which comes out to

1 \$95,000 is what her and her firm were paid for what
2 you heard on the stand. And I submit that that
3 \$95,000 opinion is in direct conflict with the
4 definitions the Court's going to give you, that it
5 may enter the environment.

6 And, in fact, let's take a look at after the
7 search warrant gets executed, there was a question
8 I believe what was happening now with the coal
9 field -- with the K087 waste. Well, that may not
10 have been relevant, but what was relevant was what
11 happened right after the criminal search warrant?
12 On December 17th after having civil regulators come
13 in, look at the material, sample it, then the
14 criminal inspectors come in.

15 The criminal agents execute their search
16 warrant, and then the light goes off. You know
17 what, we probably shouldn't be putting this on the
18 ground. There is a policy change. No more
19 material on the ground. In fact, you heard I
20 believe from Mr. Dahl that sometimes it went on the
21 pad in the past. Sometimes it went out to the
22 field. After December 17th of 2009? No, they
23 changed. I'd submit to you because they knew what
24 they were doing was wrong. They built the pad in
25 1994. You heard the regulations came into effect

1 in 1992. Put it all together. Use your common
2 sense. I submit to you they knew what they were
3 doing was wrong.

4 Now at this point I'm moving along. I want to
5 just thank you for your service. A month ago to
6 the day you were brought into this courtroom,
7 probably never expected to be sitting where you're
8 sitting now. And I appreciate -- I know on behalf
9 of the government I appreciate your attention, the
10 questions, the way you've approached this case,
11 it's -- it's really a commendable -- the most
12 commendable public service is what you ladies and
13 gentlemen are doing right now. And I couldn't even
14 fathom being just taken out of my normal day and
15 having to sit in that box for 30 days, and so I
16 thank you. I thank you for your patience and your
17 time in this case.

18 Now the one thing -- the one count I haven't
19 discussed yet is the obstruction of justice count.
20 And that's the last count we're going talk about
21 here. That's Count 16. Because that gets back to
22 this practice, this decision, the choice to comply
23 or deceive. And that charges Defendant Kamholz
24 with obstruction of justice in the instruction that
25 he gave Mr. Cahill who you heard on the stand prior

1 to the EPA inspection. And that was if you
2 remember the testimony with reference to the
3 bleeder, they were walking around prior to this
4 inspection, and Defendant Kamholz said -- again,
5 this is my recollection, my notes of what
6 Mr. Cahill said, "Pat, we can't have that going off
7 while they're here." And he was questioned on
8 cross-examination about whether that was "they're
9 here" or not, and he said, "Yeah, I recall to this
10 day he said, we can't have that going off while
11 they're here." That's the -- and in response Pat
12 Cahill says, "Okay, I'll take care of it."

13 Now I believe there was questioning of
14 Mr. Cahill about well, you know, Defendant Kamholz
15 never told you hey, every day adjust it up, adjust
16 it down, adjust it up, adjust it down every day, he
17 never told you that, did he? No. No. Again, this
18 is your common sense, ladies and gentlemen, is --
19 when we come into the courthouse we've got to check
20 certain things. We've got to check our cell
21 phones, electronic devices. The one thing you're
22 not supposed check is your common sense.

23 In fact, the Judge has already told you you can
24 use your common sense. You're expected to use your
25 common sense, and at the moment that Mark Kamholz

1 says "Pat, we can't have that going off while
2 they're here", and Pat Cahill says, "Okay, I'll
3 take care of that", you don't need any
4 extraordinary leaps of imagination to know that
5 Mark Kamholz knew what Pat Cahill meant by "Okay,
6 I'll take care of that."

7 This is kind of crude analogy, but think of
8 Rocky and I, we are out on the street, and we're
9 hit men, and Rocky gives me a gun and says, "Hey,
10 go take care of him." And I say, "Okay, I'll take
11 care of him" and he hands me a gun. I know what
12 he's telling me to do. I don't need him to say
13 okay, make sure you're there at night, wait in your
14 car, stay on the street, wait for the person to
15 come out the stairs, follow him to a deserted
16 place, shoot him, then throw away the gun, and then
17 run away. I don't need that. Just like Defendant
18 Kamholz didn't need that. When Pat Cahill said,
19 "Okay, I'll take care of that", everybody knew what
20 was going on.

21 And so this testimony Mr. Cahill said was the
22 Friday before the inspection. Now, if you remember
23 the testimony, the Tuesday -- April 14th, Tuesday,
24 was the beginning of the inspection, so if you go
25 back, that Friday was April 10th. April 10th,

1 2009.

2 And you're going to get legal instructions on
3 this count. And there's really three major
4 elements. I'm going to step through them all,
5 because I think we need to just discuss briefly the
6 first two, that the first element you're going hear
7 about is was a proceeding pending? So was there
8 some type of proceeding, some government
9 proceeding, and was it pending at the time Mark
10 Kamholz gave that instruction? That's a required
11 element.

12 And if you remember the testimony of
13 Miss Hamre, she testified that on April 8th, 2 days
14 before that Friday, she talked to Defendant
15 Kamholz. She sent him this letter. She said, hey,
16 we're going to be there. We're coming. EPA is
17 coming. Along with that, she sent a records
18 request. Said here's some records I want you to
19 start getting ready. Number 1A process flow
20 diagram. We'll talk about that in a minute. These
21 are the records that we're going to need.

22 And at that point on April 8th, ladies and
23 gentlemen, I'd submit to you the proceeding's
24 pending at that point. Defendant Kamholz knows
25 EPA's coming. In fact, he's got this now records

1 request. He's got to start getting it ready. In
2 fact he does. You now have notes, Government
3 Exhibit 117.09. He starts putting together his own
4 notes in terms of the response. The proceeding was
5 pending on April 8th of 2009 I would submit to you.

6 The second element is that the defendant has to
7 know the proceeding is pending. That we don't
8 really need to talk about too much. He got the
9 letter. He talked to Miss Hamre.

10 The third element is the defendant corruptly
11 endeavored to influence, obstruct, and impede the
12 proper administration of the law. Corruptly
13 endeavored, it's a weird term. You're going hear
14 about it from the Judge. What does "corruptly
15 endeavor" mean? And I expect you're going hear
16 that corruptly simply means to have an improper
17 motive. Improper motive, that's it. So, you've
18 got to focus on that improper motive.

19 And when you examine all of the circumstances
20 surrounding this inspection, which we're going to
21 talk about briefly, when you examine all of that,
22 you'll get -- as Mr. Personius said, you'll get the
23 rest of the story. You'll get the improper motive.
24 It's clear. There's no question, I submit to you
25 that Defendant Kamholz acted with an improper

1 motive.

2 First we've got -- prior to -- prior to that
3 instruction, "Hey, Pat we can't let that go off
4 while they're here", prior to that instruction
5 there is a folder that we know now which was seized
6 after the fact, but we know it was in his office.
7 That folder, you'll have it. You'll have the
8 actual folder with you. It says Clean Air
9 Coalition on the top. You saw it.

10 It's got an article in there from 2005. Talks
11 about benzene into the air. You heard about a 2008
12 inspection by Mr. Carlacci, again a month ago. He
13 was looking for sources of benzene. He's trying to
14 have a dialogue with Defendant Kamholz. Defendant
15 Kamholz gives him nothing. And then now, with this
16 letter, April 8th, EPA's coming to town. He knows
17 EPA hasn't been there in a while. That's swirling
18 in his mind. That's prior to his comment.

19 Now, just after the comment in the opening
20 conference Miss Hamre testified that Mark Kamholz
21 specifically said there's no pressure release
22 valves. We don't have any. In fact, we're coke
23 oven gas deficient.

24 You heard the testimony. If they're coke oven
25 gas deficient, this thing wouldn't be going off

1 thousands of times. He passed out this flow
2 diagram. He gives this to the regulators. He has
3 that choice. He could put on there, hey, we've got
4 this pressure release valve. He doesn't do that.
5 There's no notice on this. There's no mention of
6 the pressure release valve.

7 You heard testimony of the inspectors from
8 Miss Hamre, Mr. Patel. He didn't want to answer
9 any questions about this when it came up during the
10 inspection. In fact, at one point you heard
11 testimony that he denied knowing how long it had
12 been there.

13 And you heard that he got Pat Cahill to talk
14 about the bleeder. That's consistent with his own
15 notes which are now in evidence on April 21st, 2009
16 in the a.m. "Got Pat to talk about plant pressures
17 and bleeder. Took about one week of charts. P.M.,
18 gave copies of bleeder charts for those dates.
19 Cheryl arrived." It's in his own notes.

20 So you've got the testimony of Pat Cahill.
21 You've got, in addition to that, the testimony that
22 he was mad. He was mad after this because he felt
23 like he was put on the spot. He felt like
24 Defendant Kamholz knew how long this had been
25 there. And you heard from Gerry Priamo, you heard

1 from Anthony Brossack. They corroborate his story.
2 Cahill came to them and was mad.

3 And you also heard testimony that at the
4 closing conference there was some discussion of
5 maybe raising it. And we've already seen that
6 notation without going back to that by-product
7 summary of log books, that on May 22nd they did
8 raise it. They only raised it to 110. Now that's
9 all immediately in -- immediately after this
10 inspection.

11 But we've also got to weigh the comments that
12 Mr. Kamholz gave to the EPA. And EPA specifically
13 asked about the bleeder and specifically says on
14 Exhibit 126 page 12 and 13, give us all this
15 information about the bleeder. This is what we
16 want to know. And with respect to number F and
17 number E -- or E and F, these are very specific
18 questions. So what you have to do is when you
19 weigh whether he had an improper motive, whether he
20 corruptly endeavored, look at his response. So he
21 sends it. This is now Government Exhibit 127.
22 This is page 6 and 76 of that response.

23 Now he mentioned first, I've got to note, he
24 mentions he consulted P. Cahill. If you remember,
25 my recollection is during the cross-examination Pat

1 Cahill said after this, he never spoke to -- never
2 spoke to Defendant Kamholz about the bleeder. It
3 never came up. Defendant Kamholz never talked to
4 him, and he never talked to -- vice versa. And it
5 goes down. That F, the last word, "de minimus",
6 and he's -- the question is so explicit as to
7 report -- if you've not reported this in the past
8 five years -- let's go back. "Explain whether
9 you've reported this coke oven gas emissions as
10 deviations to your Title V permit. If your answer
11 is yes, provide copies for the past five years. If
12 your answer is no, explain why such emissions are
13 not reported."

14 He says they're not reported because he
15 believes they're de minimus. You heard the
16 testimony of Harish Patel, who, based on the
17 calculations in here and what he knew of this
18 pressure release valve, in a given year was
19 173 tons of coke oven gas in the atmosphere.

20 You can use your own common sense, is that de
21 minimus? But you also have his own handwriting
22 this was a deliberate thought out response. This
23 isn't something he just typed up quick on his
24 computer. You've got his handwritten notes. This
25 is Government Exhibit 116.01.07, page 6. Take a

1 look at this. You're going to have this original.

2 You can take a look at what's crossed out there.

3 I'd suggest to you -- again, it's my reading --

4 it looks like currently. He knew how to answer

5 these questions. He chose to deceive. He chose

6 the path of deception.

7 Now, you have to evaluate these actions in

8 evaluating this improper motive, this corruptly

9 endeavored into now everything that we now about

10 this case. Everything. The battery flare stack we

11 talked about when I started. In that same

12 response, I'm not going to go through it, it said

13 specifically tell us all the times in the past five

14 years the pilot light's been out.

15 It doesn't get any clearer than that. He

16 doesn't say. He doesn't say oh, by the way, you

17 know, we've had a pilot light problem for 15 years.

18 No, he could have. He could have chose to comply.

19 He chose to deceive. You've got to look at

20 everything in making that evaluation of whether he

21 had an improper motive. Think about the comment he

22 made to Dan Heukrath who you heard on the stand

23 who, he was concerned. He started hearing about

24 benzene in the air, and he says hey, Mark what's up

25 with this benzene? And his response is well, you

1 know, there's no upper limit on how much benzene we
2 can release into the air. He's chosen again to
3 deceive his own employees. How about the comments
4 to Anthony Brossack. This relates to the quench
5 towers versus quench stations, which you've heard
6 there's no difference. There is no exemption for a
7 quench station to not have baffles when they were
8 talking about the towers. Or how about Gerry
9 Priamo when he talked about hey, there's no baffles
10 in here. Oh, it's okay.

11 You heard about how he escorted the regulators
12 around. He had the choice. He knew where they
13 would go, what they would do, and controlled, in
14 essence, what they could see.

15 Now, based on all of that I'd submit to you
16 there's no question that Defendant Kamholz, when he
17 gave that instruction to Pat Cahill, he knew what
18 he was doing, and it was for a specific purpose so
19 that they did not find out about this bleeder.

20 Now in the defendant's opening Mr. Linsin, you
21 heard this term a "stacked regulatory deck". That
22 struck a nerve with me. Because now you have the
23 evidence in the case. Now you have everything
24 presented to you. Soon you're going to go into the
25 room, and you're going to get carts of exhibits.

1 But what does the evidence show in this case? Who
2 was the deck stacked against? 1978 they ask for an
3 exemption from pushing controls. 1984 they ask for
4 an exemption from the number one tower. They don't
5 use it -- they use it less than 10 percent of the
6 time. 1996 they say they're going to modify the
7 height of the tower.

8 I submit to you the deck was stacked. It was
9 stacked against the government based on the years
10 of deception, the years of noncompliance that the
11 defendants have now put forth, and the government
12 has put forth through evidence submitted to you,
13 and that for the counts in the indictment, Counts 1
14 through 19, they made that simple choice to not
15 comply and to deceive. That simple question. And
16 I submit to you based on the body of evidence you
17 now have, there is no doubt that the defendants are
18 guilty as charged to all of the counts of the
19 indictment.

20 Again, thank you for your time.

21 THE COURT: Okay, Mr. Mango, thank you.
22 We'll take a break now, ladies and gentlemen.
23 We'll resume again at 3:00 o'clock, and you'll hear
24 the closing argument from Mr. Linsin, okay?

25 Don't discuss the case, please. Please keep

1 your minds open. Remember that the closing
2 arguments are not evidence, but they're there to
3 persuade you in terms of what the evidence has
4 shown or not with respect to the 19 counts in this
5 indictment. Okay. We'll see you in a few minutes.
6 Thank you.

7 (Jury excused from the courtroom.)

8 (Short recess was taken.)

9 (Jury seated.)

10 THE COURT: Welcome back. Please have a
11 seat. Okay. The attorneys and parties are back
12 present. You, of course, are here, ladies and
13 gentlemen, roll call waived. Thank you for paying
14 the attention that you did to Mr. Mango.

15 And as we explained to you, the second closing
16 argument, with the same rules to apply, is going to
17 be given by Greg Linsin, the attorney for Tonawanda
18 Coke Corporation. Mr. Linsin.

19 MR. LINSIN: May it please the Court --

20 THE COURT: Certainly.

21 MR. LINSIN: -- Mr. Mango, Mr. Piaggione,
22 and Mr. Personius, and ladies and gentlemen of the
23 jury, on behalf of myself and the entire defense
24 team for Tonawanda Coke, but more importantly, on
25 behalf of Mr. Saffrin, the president of Tonawanda

1 Coke and all of the employees of Tonawanda Coke, I
2 want to -- before I begin, I want to thank each of
3 you for your service, your attention, and your
4 patience throughout what has been a lengthy trial,
5 with a lot of dents and complex evidence at times.
6 I ask your indulgence as I take some more of your
7 time to offer our perspective on what we think this
8 evidence has actually shown in this case, and how
9 we think this evidence should be considered by you
10 as you begin your duty as judges of the facts.

11 I'm going to try and address three general
12 topics in my closing summation for you. First I
13 want to talk a little bit about the concept of
14 perspective. There has been a lot of detailed
15 testimony and focus on particular phrases and
16 particular documents. I want to ask you as you
17 weigh this evidence, consider it, to put it in a
18 common sense perspective, to put it in the
19 perspective that is realistic and meaningful if
20 you're really going to assess how you should view
21 and judge and weigh this evidence.

22 Secondly, I am going to address the particular
23 counts in the indictment and where we believe the
24 government's evidence has fallen substantially
25 short of the heavy burden of proof that they bear

1 in this criminal prosecution.

2 And lastly I'm going to address this issue that
3 Mr. Mango referenced briefly and that Chief Judge
4 Skretny will instruct you on at a later time
5 regarding this defense that is called entrapment by
6 estoppel. It applies to the facts of this case.
7 It is a defense that you may not have heard about
8 before, and I want to talk about it specifically
9 about what the burden is, what the parts of that
10 defense are, and how we think it actually relates
11 to the counts in this indictment.

12 So, you've heard nearly a month now of detailed
13 testimony from 30 witnesses, literally hundreds of
14 different exhibits entered into evidence. And you
15 soon will have that task of weighing all of that
16 evidence, evaluating it, and reaching your verdicts
17 in this case.

18 But as you begin that task, I want you to
19 consider one question as a threshold matter.
20 Virtually every charge in this indictment relates
21 to a time period 2005 to 2009, essentially a
22 five-year period of time. But obviously you've
23 heard a lot of testimony, a lot of evidence about
24 decades of prior interaction between this company
25 and Mr. Kamholz and the inspectors and regulators

1 from DEC and in some instances EPA.

2 And you've heard that, ladies and gentlemen,
3 because it is relevant, it is important to your
4 understanding and your evaluation of these actual
5 charges in the counts in the indictment. You need
6 to look at the actual counts. But I suggest to you
7 that you also have to weigh the evidence regarding
8 those counts and test that evidence against the
9 background of 30 years essentially of interaction
10 between this company and the environmental
11 regulators, some of whom you've heard testimony
12 from and some of whom you haven't.

13 And as I go through those counts, I will
14 suggest to you how we believe that background
15 course of conduct, those decades of interaction
16 really are relevant and should be considered by you
17 in weighing the charges in this case.

18 Another general perspective issue I think
19 relates to what Mr. Mango has now reaffirmed as the
20 government's core theory of motive in this case,
21 that Tonawanda Coke simply elected to do things
22 that were not compliant with the environmental
23 regulations in order to save money, that they made
24 a choice, business decision, to increase profits
25 rather than protect the environment.

1 But I ask you to take a look at the overall
2 fabric of evidence in this case and ask yourself
3 where is that evidence about the business decisions
4 that Tonawanda Coke actually made? Mr. Mango
5 offered and made reference in his summation to a
6 business plan, and somehow by selecting the clauses
7 and sentences that he did seem to imply that it was
8 somehow sinister or improper for a company to
9 consider the costs of environmental compliance as
10 it planned for and structured its business
11 activity.

12 I submit to you, ladies and gentlemen, that
13 your own common sense tells you that any company in
14 making plans for how it is going to manage its
15 assets, how it is going to dedicate and appropriate
16 its resources has to do precisely that. That is
17 what a business does. And the reality is -- again,
18 you can use your common sense -- it does cost money
19 to comply with environmental regulations.

20 It is not as Mr. Mango suggested that money is
21 no issue. Money, of course, is an issue. But what
22 you see in many of the documents -- and a number of
23 them have been entered into evidence. There's been
24 testimony from witnesses on this point. The issue
25 of environmental compliance is not whether it's

1 going to cost money or not. The issue is is the
2 potential environmental benefit that might be
3 realized from a certain expenditure worth that
4 cost? What is the cost benefit, and how does that
5 factor into whether it should be required under the
6 regulations?

7 And you'll see that theme woven through many of
8 the communications. The original discussion about
9 the exemption for the baffles talks about both of
10 those points, in the original letter from Tonawanda
11 Coke and in the response from DEC. This is an
12 obvious and common sense recognition that you have
13 to balance those issues and weigh them in
14 evaluating whether or not costs are warranted.

15 But the other bigger picture here is to take
16 into account that -- and there has not been
17 evidence on these points, but I ask you to use your
18 common sense on this point too, that compliance
19 with the environmental laws, all of the
20 environmental laws that you know this company is
21 subject to, does cost money. This company had to
22 have expended substantial resources in order to
23 achieve compliance.

24 We're here on specific charges, and in
25 evaluating and weighing the evidence based on the

1 government's theory of motive here, ask yourself,
2 what are the actual costs of compliance for these
3 charges that relate to these activities that relate
4 to the charges in the indictment?

5 There's a stipulation that the baffles in both
6 quench towers, when finally installed, 10 of the 19
7 counts in this indictment, total cost of \$125,000.
8 It is real money, as I said in my opening
9 statement, to any one of us. It is a cost of doing
10 business to a company that is a going concern and
11 recognizes that compliance costs have to be
12 factored into a business plan. It is not a
13 prohibitive cost. The cost -- again, no direct
14 testimony on this point.

15 But circumstantially and using your common
16 sense, think about this pressure relief valve about
17 which there's been so much testimony. I'll address
18 this issue of whether it was in the permit or not
19 or whether it needed to be. But common sense is
20 going to tell you this is not a big ticket item to
21 fix or to adjust.

22 The costs of compliance was one that the
23 company itself undertook by blanking off this valve
24 in early 2010, and making other accommodations
25 throughout the plant in order to manage the

1 pressure. This too is not a substantial cost that
2 reasonably and rationally would drive criminal
3 misconduct.

4 Lastly, with regard to the RCRA counts, the
5 management of these hazardous wastes, we know from
6 the testimony that this concrete pad was installed
7 in 1994 out in the coal fields. The testimony was
8 consistent from a number of witnesses that it was
9 installed because some offsite material was being
10 brought in, could not be recycled right away, and
11 was going to be stored on this concrete pad. And
12 that's what it was mainly used for.

13 Sometimes the K087 from by-products was moved
14 to the pad before it was mixed. But the reason for
15 the installation of that pad, the testimony is
16 uncontradicted, was to store and manage this
17 offsite waste.

18 So what would be the cost of compliance to the
19 company for using the pad for mixing of the coal
20 tar sludge from the by-products or for the material
21 from the tank for that matter? Absolutely zero.
22 The pad was already there.

23 So there is a certain degree of illogic and
24 disconnect in this government's primary theory
25 about why this company engaged in conduct that the

1 government alleges was a violation. The
2 government's theory in this regard, we submit to
3 you, its overarching theory about this case simply
4 doesn't hold together when the actual costs of what
5 would be the compliance measures are weighed with
6 your own common sense and judgment. These are not
7 substantial issues.

8 I also ask you as a matter of perspective and
9 judgment as you weigh this evidence to consider
10 what we submit the evidence has shown to be a
11 certain degree of cherry picking and
12 mischaracterization of evidence and integrity of
13 evidence that is questionable and unreliable that
14 has been presented to you by the government.

15 And one example I want to offer -- and I didn't
16 hear Mr. Mango address this in his summation. But
17 you heard the testimony presented to you by the
18 government of Pete Dolan and Frankie Gonzalez about
19 this practice they sometimes engaged in in lowering
20 the back pressure on the ovens before the 303
21 inspector would come. And the implication there,
22 and the point that the government was seeking you
23 to take from this was, see, this is a company that
24 is trying to actively deceive the 303 inspectors.

25 But the problem is, and I suggest perhaps the

1 reason Mr. Mango didn't address it in his summation
2 is that that characterization blew up as soon as
3 Mr. Priamo took the stand. And Dan Heukrath took
4 the stand and said, wait a minute, we heard about
5 these guys that sometimes were tinkering with this
6 back pressure. That was against the policy that we
7 were trying to instill in the operation of this
8 battery. We reprimanded them. Mr. Priamo
9 testified that he even had to put an extra man on
10 Pete Dolan's shift to help him properly perform the
11 sealing and maintenance functions that are required
12 to help him avoid the shortcuts he was taking.

13 And then you may recall, Mr. Priamo testified
14 he even had to take away Mr. Dolan's chess set,
15 because that's what Mr. Dolan was doing on the
16 battery instead of properly performing his
17 maintenance activities.

18 That evidence, I submit to you, is unreliable.
19 It is a mischaracterization. It is a suggestion
20 that this misconduct by a couple of employees
21 should somehow be imputed to this company and
22 company policy. But Mr. Priamo, you may remember
23 on cross-examination now, a government witness on
24 cross-examination, made it clear that that -- that
25 the conduct that was referenced by Mr. Dolan and by

1 Mr. Gonzalez was just that, misconduct, and was not
2 to be condoned.

3 There was another thread of evidence elicited
4 from the government's witnesses. You may recall,
5 and, again, not something Mr. Mango referenced,
6 about this practice of stopping visitors at the
7 guard gate. And somehow the inference was to
8 detain them or defer them from coming into the
9 plant. But that also misfired when it became clear
10 from a number of witnesses, and what you can infer
11 from your own common sense, that that practice is
12 standard operating procedure at industrial
13 facilities. It is a mandatory safety requirement
14 for visitors coming on. Even when a fire chief
15 comes to a facility, if the guard doesn't
16 understand the reason for that person being there
17 or who they may be, they're not just going to
18 provide free access. You cannot just permit
19 visitors to stroll around an industrial plant.

20 That evidence too was misapplied,
21 mischaracterized, and I suggest shows you a
22 problem, a fundamental problem with the integrity
23 of the evidence the government has offered.

24 I also ask you to weigh what are certain
25 logical gaps and holes in the government's

1 evidence, and as you assess the credibility of
2 particular witnesses and the overall presentation,
3 ask yourself a couple of these questions, why is
4 it, for example, that it was the defense that had
5 to call Gary Foersch as a witness in this trial?
6 Gary Foersch, who, unquestionably, was the lead
7 principle contact from DEC with Tonawanda Coke for
8 30 years. We called him. We called him so you
9 could hear his testimony. Why is that, ladies and
10 gentlemen?

11 Why is it also that we called Ken Eng, the EPA
12 official from New York? Why did we have to present
13 that evidence to you? And we will return to Mr.
14 Eng in a few moments about what we think to be a
15 particularly telling example of EPA's perspective
16 on this case. I'll come back to that when we
17 discuss the issues of baffles.

18 These are the kinds of things I'm talking about
19 though, ladies and gentlemen, when I ask you to
20 keep all of this evidence in perspective. You need
21 to drill down, you need to understand the details,
22 but you also need to understand how those details
23 fit with what has been a very long history of
24 interaction by Tonawanda Coke and Mr. Kamholz with
25 the regulators responsible for overseeing

1 environmental compliance.

2 Let me turn to talk about the particular groups
3 of charges, and I am going to talk about them in
4 groups that are contained in the indictment. But
5 before I do, I need to ask you -- Chief Judge
6 Skretny will instruct you on this, of course. I
7 know he has mentioned it a number of times
8 throughout the course of the trial. But there can
9 hardly be any more important point here, and that
10 is as to each and every fact you are asked to
11 consider, your charge, your duty as jurors is to
12 ask yourself whether the government through its
13 evidence from the witness stand has proven that
14 fact beyond a reasonable doubt. And you will
15 receive an instruction -- you did receive an
16 instruction on what reasonable doubt means.

17 But it is that kind of evidence, ladies and
18 gentlemen, that a reasonable person would not
19 hesitate to rely or act upon in the most important
20 affairs of his or her life. That is a very high
21 burden. And we submit to you that the government's
22 proof has fallen far short of that standard in a
23 number of respects that I will be discussing with
24 you.

25 Now I want to turn first to the first group of

1 counts, Counts 1 through 5 of the indictment
2 regarding this pressure relief valve. And before I
3 get into the elements that I want to ask you to
4 consider particularly there, I want to also ask you
5 to think about the evidence concerning that PRV in
6 some perspective. There is no doubt and we can
7 clear this out, there is no controversy that this
8 pressure relief valve in the by-products department
9 was not included in Tonawanda Coke's Title V
10 application. It was not in its Title V permit.
11 But the story about that valve doesn't begin there,
12 as the evidence has shown you.

13 But as you consider that permit, as you think
14 about what the meaning is that that valve is not in
15 that permit, we ask you to take a look at that
16 whole permit, take a look at the level of detail,
17 the volume of information that is contained in the
18 permit application and then reflected in the permit
19 itself. Ask you if that level of disclosure, that
20 level of detail is consistent with a company that
21 is trying to hide something important. How does
22 that fit in context? What does the rest of this
23 permit tell us? It must tell us something about
24 how significant or insignificant this pressure
25 relief valve actually is.

1 Literally hundreds of vessels, tanks, valves
2 and other components listed in this -- in this
3 permit application and in the permit itself. Take
4 a look at it in its entirety as you evaluate this
5 evidence of the pressure relief valve.

6 The second point and the government put up a
7 picture -- I'm not going to do it. I think we've all
8 probably seen it enough. If a company was
9 attempting to hide or conceal or somehow deceive
10 regulators, would they in their right minds have
11 placed a pressure relief valve in what could be no
12 more obvious location in the by-products area than
13 where it was? The location of that valve itself
14 tells you something. And clear and obvious I think
15 is a fair description from whatever angle the
16 picture is taken, whether it was on the top of the
17 battery as Mr. Mango's photo was taken, from the
18 ground itself. The location of this valve tells
19 you something about the intentions of the company
20 that installed it.

21 It also tells you something, and we don't
22 dispute that this 2003 HAPS inventory that
23 Mr. Mango referenced in his summation, that was not
24 a supplement to the permit. It was not a request
25 to change or amend the permit. But there is no

1 doubt that that information, that information about
2 the pressure relief valve on the coke oven gas
3 system was explicitly and expressly provided to
4 DEC, the very regulators that issued the permit,
5 and then to EPA. Clear as day in the document.
6 Nonsense, I think not.

7 What does it tell you about the actual
8 intentions of the person submitting a document like
9 that? We submit to you that all of this background
10 information that I've just asked you to reflect on
11 demonstrates not that Tonawanda Coke was acting in
12 some way to conceal the presence of this pressure
13 relief valve, but was acting on a belief, rightly
14 or wrongly, but acting on a belief that it was
15 simply not necessary to include this particular
16 valve in its Title V permit.

17 You saw a number of exchanges between the
18 company and the regulators about exemptions and
19 exclusions from permits. And ask yourself, ladies
20 and gentlemen, whether or not that background
21 context that I've just outlined for you isn't
22 suggestive of just that with regard to this valve.

23 We also ask you to consider this pressure
24 relief valve, not just in the context of the
25 permit, but in the context of the overall

1 activities of this plant. Where does this valve
2 fit in terms of comparative and relative
3 significance for this coke producing facility?

4 You heard testimony that the battery itself, 60
5 separate ovens, 120 doors with lids throughout the
6 top of the battery emitted raw coke oven gas 24
7 hours a day, seven days a week, 365 days a year.
8 That was understood. It was recognized by the
9 inspectors. It was expected that the company would
10 do what it could to minimize those releases,
11 minimize the leaks of raw coke oven gas. But this
12 was a recognized function of a properly functioning
13 coke oven battery. That's part of the context of
14 this plant.

15 There was also regular monitoring of the stack
16 emissions from the boiler house and from the waste
17 heat stack. Tests of actual opacity limits and
18 components from emissions in these stacks, major
19 emissions from these stacks. How does that compare
20 to the 4-inch pressure relief valve in by-products?

21 Also as you're considering this pressure relief
22 valve you may not -- it may not have registered as
23 the evidence came in, but I ask you to recall and
24 take a look at Government Exhibit 92, which was
25 read -- a portion of which was read into evidence.

1 It was an Air 100 permit issued by DEC in 2000 to
2 Tonawanda Coke, and it related to a proposal to
3 deactivate a piece of equipment in the by-products
4 area, the desulfurizer in the by-products area.

5 And in that document DEC itself took a look at the
6 potential benefits and trade-offs for deactivating
7 this piece of equipment, and described -- and these
8 are its words -- describe the fact that after coke
9 oven gas is passed through the by-products area in
10 this plant, it is purified gas. Purified. And the
11 testimony is uncontradicted that this pressure
12 relief valve was downstream of this by-products
13 department.

14 And so, it is simply not logical when you think
15 of it in this context that Tonawanda for some
16 reason would have sought to conceal this
17 comparatively minor emission source from DEC itself
18 when that agency has described it -- the gas that's
19 flowing at that point as purified gas, and you're
20 comparing releases from a 4-inch pipe to the
21 releases that are occurring on a daily and hourly
22 basis from the ovens.

23 Now, I want to comment on one particular point
24 that Mr. Mango also made in this regard about the
25 April '09 inspection, the joint inspection. And he

1 referenced the testimony from Miss Hamre, as you
2 may recall. Miss Hamre who had taken some notes at
3 the orientation meeting. And there was a notation
4 in her notes and you saw -- no, you didn't see it.
5 A notation in her notes that there was no PRV. And
6 Mr. Mango in his summation suggested to you again
7 that this was a statement from Mark Kamholz at this
8 orientation meeting declaring there's no PRV in
9 this facility.

10 I submit to you that the testimony of
11 Miss Hamre was something quite different. The
12 testimony of Miss Hamre as you may remember is that
13 when you actually walked through the notes and took
14 comment in her notes in context that she was
15 talking and referencing a discussion about the
16 battery, a location where there was no pressure
17 relief valve. Who in his or her right mind, when
18 sitting and meeting with a group of EPA and NEIC
19 inspectors, knowing there's this pressure relief
20 valve on the coke oven gas line out in by-products,
21 knowing that seven years -- six years previous
22 you've submitted a statement saying, hey, we have a
23 PRV up here, who in their right mind would sit
24 there and say no, no, there's no PRV anywhere in
25 this plant? That is a mischaracterization of the

1 testimony. It is a characterization, I submit to
2 you, that flies in the face of common sense.

3 Now, let me talk about some of the particular
4 elements that the government is required to prove
5 beyond a reasonable doubt for each of these five
6 counts that relate to the PRV, and I'm actually
7 going to be talking about one count -- one of the
8 elements, but a couple of issues with regard to
9 that element. And as Mr. Mango said, we can talk
10 about these counts in a group, because they're
11 really just broken up by year, '05, '06, '07, '08,
12 '09. The elements are going to be the same.

13 You may recall that when Mr. Carlacci testified
14 and Mr. Sitzman testified, two of the
15 representatives from DEC's air emissions office, I
16 asked them a number of questions regarding the
17 regulatory definition of an emission source and
18 emission point. And both of them acknowledged and
19 agreed that those are two different concepts under
20 the regulations. Both of them agreed that -- and
21 you will be given a definition in the Court's
22 instruction on this point. An emission source
23 under the definition, it's true it does say machine
24 or apparatus, but it is a machine or apparatus
25 causing an emission. That's what a source is.

1 An emission point -- and both witnesses agreed
2 on these definitions -- an emission point is a
3 conduit, a chimney, a duct, a vent, a flu, or an
4 opening of any kind through which emissions are
5 released into the atmosphere.

6 The testimony in this case, ladies and
7 gentlemen, is uncontradicted that to the extent
8 anything was released through that pressure relief
9 valve, the cause, the cause of that release was
10 either the mechanism in the ovens themselves that
11 were reversing and causing a backup in the
12 pressure, or the exhausters that were situated in
13 the by-products department which created pressure
14 on that point of the line. The testimony is
15 uncontradicted that this pressure relief valve was
16 nothing more than a passive conduit, a passive vent
17 through which releases were caused by other
18 components in the facility.

19 This is the literal language of the
20 definitions. It is a common sense application of
21 those definitions to the terms that are charged in
22 each of these five counts. If the government
23 hasn't proven beyond a reasonable doubt that the
24 pressure relief valve is an emission source, their
25 proof on these counts, on each of the counts fails.

1 You also may recall in the direct testimony of
2 both Mr. Carlacci and Mr. Sitzman there was
3 testimony from both of those witnesses that, yes,
4 this valve should have been included in the permit.
5 Failure to include this valve in the permit was a
6 violation of condition four of the facility's
7 Title V permit. That was about as deep as the
8 analysis went on direct examination.

9 But you may remember on cross-examination we
10 called up condition four, and we actually asked the
11 witnesses to walk through what condition four
12 actually says. And, ladies and gentlemen, that's
13 what you need to do too. Because the indictment
14 charges that the operation of this valve was a
15 violation of that condition. And if you remember,
16 condition four in the permit says that if, if an
17 emission source was the subject of permitting
18 requirements under the New York regulations at the
19 time of construction or modification, then it
20 needed to be put in the permit.

21 You may remember that neither Mr. Sitzman nor
22 Mr. Carlacci had any idea, had not inquired, had
23 not asked the company when this valve was
24 constructed. And by the way, is it surprising that
25 when asked at the joint inspection of April of

1 '09 that Mr. Kamholz didn't know when this valve
2 was constructed? Not a single witness who's
3 testified here knew when that valve was
4 constructed. But certainly not the government's
5 witnesses who were asked to apply this regulation.
6 They had no idea when it was constructed, either of
7 them.

8 Mr. Carlacci, when I asked him well, so when
9 was this valve modified? Do you know when it was
10 modified? He testified he did not know. And we
11 talked a little bit about the definition of
12 modification. And I walked him through what's in
13 that language, and the Judge will give you that
14 language as well.

15 But the modification is very -- the definition
16 is very specific. It means a physical change in
17 the method of operation of an incinerator, that's
18 not this situation, or a stationary combustion
19 installation, that's not a PRV, or a process. And
20 if you may recall, when I asked Mr. Carlacci
21 whether the PRV was a process, he testified no, it
22 was not a process.

23 Now, Mr. Sitzman did testify that in his
24 opinion it was a process, this valve was a process.
25 And he did testify that any adjustments or changes

1 in the set point would, in his opinion, constitute
2 a modification. But I ask you to weigh the
3 government's own evidence on this point. Their two
4 Clean Air Act witnesses are in direct contradiction
5 of one another about the literal terms of this
6 condition that governs these five counts. And when
7 I asked Mr. Sitzman well, can you show me one other
8 process in this permit that is confined to a single
9 valve? He was not able to do it.

10 You will have the ability to look at this
11 permit. You will look at how processes are treated
12 in this permit. And I ask yourself using your
13 common sense, using your good judgment and
14 intelligence, whether or not the testimony of
15 Mr. Sitzman holds water on this point. Failing
16 that, the government's evidence here fails as well,
17 and fails fatally for each of these five counts.

18 Let me turn then to the next group of five
19 counts in the indictment, and that would be
20 Counts 6 through 10, and those relate to the
21 absence of baffles in this western quench tower,
22 quench tower number 1. No debate on this issue.
23 Quench tower number 1 did not have baffles at any
24 period of time relevant to this indictment. No
25 real debate -- as we submit the evidence shows, no

1 real debate in 1984 DEC granted Tonawanda Coke an
2 exemption and said you don't need baffles in quench
3 tower number 4 [sic], again weighing the cost
4 benefit analysis of the cost of installing baffles
5 versus the potential minor benefit that baffles may
6 achieve.

7 Gary Foersch testified just a few days ago when
8 we called him to testify, that it was his
9 understanding that this exemption for baffles in
10 quench tower number 1 continued until he retired,
11 which was November of 2009. But it's not just Gary
12 Foersch's testimony.

13 You may remember that in October of 2009 DEC
14 sent out a Notice of Violation, one of these NOV's,
15 about the baffles to Tonawanda Coke. And that NOV
16 from DEC only talked about the baffles in quench
17 tower number 2, the eastern baffles, and said
18 install baffles in that tower.

19 I submit to you, we submit to you that that NOV
20 from the agency itself signed by Mr. Sitzman
21 recognizes that even as of October of 2009 the
22 agency itself recognized that this exemption still
23 applied to quench tower number 1, even though, as
24 we all know, it had been inadvertently left out of
25 the actual Title V permit. There would be no other

1 reason for DEC to only require baffles in quench
2 tower number 2, unless they recognize that this
3 exemption was valid and applied, and therefore no
4 baffles were required for that western quench
5 tower.

6 Now Mr. Mango made some reference to the
7 testimony that's been introduced about the
8 percentage of usage for this quench tower number 1
9 and whether somehow the testimony is sufficient to
10 demonstrate that quench tower number 1 was used
11 beyond this 10 percent limit that is built into the
12 exemption. I ask yourself, first of all, as you
13 think about this evidence, why is it that the
14 government, in producing this evidence to you,
15 relied primarily upon witnesses who had only
16 incidental or occasional contact with these
17 baffles? Why is it that they have clung to those
18 phrases that these witnesses have given to them,
19 used alternatively? Why is it that those witnesses
20 do not recall the testimony -- the fact that was
21 established through the testimony of other
22 witnesses that quench tower number 1 during this
23 relevant time period, '05 to '09, was actually out
24 of service completely for years, a period of years?

25 As you consider the evidence that Mr. Mango

1 referenced in his summation, I ask you also to
2 consider the testimony, again elicited on
3 cross-examination, from Mr. Dan Heukrath, who
4 testified directly, yeah, quench tower number 1 was
5 out of service for several years. It was back in
6 service around 2008, and he specifically remembered
7 then that he was instructed by Mr. Kamholz, hey,
8 we're using this tower again, but remember, we're
9 not using it more than 10 percent of the time.

10 Mr. Priamo also testified that that quench
11 tower number 1 was out of service for several years
12 and was used infrequently even when it was in
13 service. Mr. Brossack himself said as we recall --
14 and all of this came out on cross-examination of
15 these witnesses -- number 2, the east quench tower,
16 was the one used predominantly. Number 1 was used
17 only from time to time in the winter to keep the
18 pipes from freezing.

19 Now that is not evidence you heard referenced
20 in Mr. Mango's summation, and I suggest to you that
21 the testimony from those three witnesses alone is
22 sufficient to demonstrate that quench tower number
23 1, first of all, was out of service for years
24 during this relevant time period. We don't know
25 exactly which ones, but for years. And when it was

1 being used, it was used sporadically and used
2 infrequently.

3 The weight of the evidence about this usage of
4 quench tower number 1 demonstrates, we submit to
5 you, that its usage was consistent with and
6 compliant with this condition that was placed on
7 the exemption, the exemption that the agency itself
8 knew was in effect when it issued its Notice of
9 Violation in October of 2009, that Mr. Foersch knew
10 was in effect for quench tower number 1 when he
11 retired in November of 2009.

12 There's another significant piece of evidence
13 on this issue that I'm going to ask you to take a
14 look at, and I think this is the only exhibit I'm
15 going to be calling up at this point. But could we
16 have, please, Government Exhibit 3518.04. And go
17 to the second page of this document and enlarge the
18 top half please.

19 You may recall that this was an exhibit that
20 was introduced by the defense when we called Mr.
21 Eng to testify in our case. Mr. Eng was the chief
22 of the air resources office in New York. He had
23 only incidental contact with the air inspections at
24 this facility, but as of the end of 2009, he
25 testified that he got a call -- DEC had already

1 issued this NOV I was talking about. And then in
2 December of 2009 EPA issues its own separate Notice
3 of Violation, and it requires baffles in both
4 quench towers. And so Mr. Sitzman calls Mr. Eng,
5 that's precisely what Mr. Eng said, and Mr. Sitzman
6 said as is recited in here, "The west quench tower
7 has a history behind it. In speaking to Larry
8 Sitzman of the NYS DEC, he said that the state and
9 TCC had an agreement, parentheses, memorialized in
10 some letter which Larry will send me a copy of,
11 close paren, that as long as TCC only uses this
12 quench tower for backup duty, less than 10 percent
13 of the time, that the state would not require
14 baffles."

15 And then we have what I think is a very telling
16 acknowledgment and a very revealing insight into
17 the judgments made by EPA in 2009 that directly
18 resulted in the charges in this case.

19 Mr. Eng wrote, "Although TCC had in its Title V
20 permit application a request not to have to install
21 baffles for this quench tower, citing this prior
22 agreement with the state, the current Title V
23 permit, paren, which has since expired and has not
24 yet been renewed, does not acknowledge this
25 agreement. The state accidentally left this

1 provision out and TCC never caught it."

2 Mr. Eng understands there was an exemption.
3 He's been told by DEC. There is a letter
4 memorializing this. He recognizes there was a
5 mistake in not incorporating it in the very permit
6 that is the essence of Counts 6 through 10 of this
7 indictment. And he makes the decision, as
8 reflected in this memo, a decision that I suggest
9 reflects a stacked deck mentality on the part of
10 this agency, an overzealous mentality with respect
11 to enforcement, a mentality that states we need not
12 bother with these details. I don't need to wait
13 until I get this letter from Sitzman.

14 Do you remember Mr. Eng said I never bothered
15 to follow-up. I never inquired further. No need
16 to evaluate fairly whether this exemption the DEC
17 understood still existed was valid and should be
18 honored. DEC missed it. Tonawanda didn't catch
19 it. So the Title V permit on its face requires
20 baffles in quench tower number 1. Let's let
21 Tonawanda argue itself out of this one if it can.

22 I submit to you that is the mentality that is
23 betrayed by this email. And it is not a mentality
24 that is consistent with straight dealing and fair
25 dealing. It is a mentality that relates directly

1 to Counts 6 through 10 of this indictment. And I
2 submit to you that the overwhelming weight of this
3 evidence shows that there was a valid exemption,
4 that there is no credible evidence that the company
5 somehow exceeded this limitation during a year's
6 period of time, because that's what -- that is the
7 test. Mr. Sitzman said ten percent of the time
8 over a year's period of time. And that doesn't
9 mean there couldn't be incidental usages from this
10 week to that that might extend 10 percent on any
11 spot check.

12 But the instructions you will get on these
13 counts will tell you if there was a valid
14 exemption, then the government's proof has failed.
15 And we submit to you that's precisely what the
16 evidence shows you. That with regard to these five
17 counts of this indictment, the government has
18 proceeded knowing there was an exemption, just as
19 Mr. Eng suggested in his memo he was going to do.

20 At a minimum I suggest to you that the evidence
21 I've just outlined demonstrates there is clearly
22 and inarguably a reasonable doubt as to whether the
23 government has proven these counts.

24 Let me talk next about the next group of quench
25 tower counts, that's Counts 11 through 15, and

1 those are the counts that relate to the eastern
2 quench tower, quench tower number 2.

3 Now, we can clear, I think, some of the brush
4 out of the way on these counts. There hasn't been
5 any contradiction in the evidence that there is
6 this 1996 letter from DEC that says, hey, look,
7 we're going to prove you're lowering this quench
8 tower number 2, but we remind you you've got to
9 have baffles in that -- in that quench tower. That
10 letter's there. We don't dispute it. We also
11 don't dispute that the Title V permit itself states
12 you have to have baffles in quench tower number 2.

13 But the evidence doesn't really stop there,
14 because what we also have -- and this is part of
15 the context that I've asked you to keep in mind as
16 you weigh that particular evidence with respect to
17 these counts -- you have a context of interaction
18 between Gary Foersch and Mr. Kamholz and Tonawanda
19 for a 13-year period of time.

20 Thirteen years, from '96 when this letter first
21 goes out approving the lowering of the quench
22 tower, till 2009, when the joint inspection occurs,
23 and there is an official recognition that there are
24 no baffles in this quench tower. What you have and
25 we submit to you it is very revealing, and you and

1 you alone will be the judges of the credibility of
2 Mr. Foersch on this. But we submit to you that
3 Mr. Foersch's testimony is important and
4 instructive and critical in assessing what that
5 13-year interval is.

6 Mr. Foersch testified that on multiple
7 occasions he and Mr. Kamholz had discussions about
8 whether these baffles were in any way effective or
9 whether they provided even minimal benefit. And he
10 testified that he repeatedly agreed with
11 Mr. Kamholz that they didn't. That they were not
12 significant, at least in Gary Foersch's mind.

13 He also agreed, as we recall the testimony,
14 with Mr. Kamholz's point that once you've lowered
15 this quench tower, the upward velocity is lessened,
16 and so the risk of particulate matter spreading
17 beyond the immediate localized area was reduced.
18 That's a matter of simple physics I suggest to you.

19 Mr. Foersch testified that after this permit
20 was issued in 2002, he looked up into the quench
21 tower, he saw there were no baffles up there. He
22 did say, yeah, I said something to Mark, hey, you
23 got to get baffles installed. But he also
24 testified that in his heart of hearts, and I think
25 this may have been the most sincere aspect of his

1 testimony. In his heart of hearts he knew there
2 were no baffles in that quench tower. I submit to
3 you he knew before he even looked up there.

4 Now, there were seven years between the time
5 that the permits issued and these inspections
6 in 2009. And we understand, we heard the testimony
7 just as you did, that during this trial for the
8 very first time in all the times Mr. Foersch has
9 been interviewed, and despite the fact that he's
10 testified previously in the grand jury about these
11 issues, for the first time in testimony here he
12 recalled that Mark Kamholz told him oh, yeah, I've
13 installed baffles in that quench tower.

14 I ask you to weigh that testimony carefully. I
15 ask you to weigh, first of all, whether it even
16 makes sense that Mark Kamholz, knowing that there
17 are no baffles in that quench tower, would tell a
18 regulator yes, there are. Much like the no PRV in
19 the by-products department when it's sticking right
20 up there. Why would he say something like that? I
21 submit to you, ladies and gentlemen, that that
22 piece of testimony from Gary Foersch is nothing but
23 a fig leaf, a fig leaf that permitted him to save
24 some face in what had to have been a very
25 embarrassing and difficult position for him.

1 He knew and the record demonstrates that he
2 interacted with this facility for 13 years after
3 the 1996 letter, and this was a matter that was
4 simply not important to him. He communicated that
5 to Mr. Kamholz. At no time in those 13 years did
6 he ever tell Mr. Kamholz in any official way, hey,
7 you got to install baffles in here.

8 And the course of conduct, we submit to you,
9 shows that this agency, DEC through the person of
10 Gary Foersch, knew there were no baffles in that
11 second quench tower and simply accepted it,
12 regardless of what the literal language in Title V
13 permit was. That's what this evidence shows.

14 He exercised his discretion and the company and
15 Mr. Kamholz reasonably relied on the interaction of
16 the regulator that was assigned to them in
17 interpreting and understanding what were the real
18 requirements of this permit.

19 Now I'll come back to these five counts when we
20 talk about the entrapment by estoppel defense.

21 Let me turn now to the RCRA counts. And I want
22 to say I'm not going to be specifically addressing
23 in my summation this Count 16, the obstruction of
24 justice count. Mr. Personius will be talking to
25 you directly about that. But before I move on to

1 RCRA, I want to say to you it is imperative with
2 that count as well that you take a look at that
3 evidence in context. Take a look at that evidence,
4 not just the moment that is looked at under a
5 microscope in this exchange between Mr. Cahill and
6 Mark Kamholz. But look at it in a broader context
7 that we submit to you is important in evaluating
8 what that interaction actually meant and what it
9 didn't mean.

10 The RCRA counts and I'm going to talk about
11 them in somewhat reverse order. I'm going to talk
12 about Count 19 first, because Count 19, as you may
13 remember, relates to the overall management of this
14 K087 material that was the material generated from
15 the ongoing process. I'll talk about 17 and 18 in
16 a minute, the material from the tanks.

17 As we -- as you consider these counts, I ask
18 you to look at 20 years of history that Mr. Mango
19 did not say a single word about. Mr. Mango
20 referenced the testimony of Mr. Flax and
21 Mr. Strickland. But as you know, the testimony,
22 the evidence about these RCRA issues at Tonawanda
23 goes back to the '80s. It goes back to the '80s,
24 and in order to understand what actually was meant
25 and what was required and what was understood by

1 Tonawanda in 2009, you've got to go back to the
2 history of the regulatory interaction regarding the
3 very activities that are the subject of these
4 counts.

5 And what that evidence shows, no dispute,
6 uncontradicted evidence that in '86, Tonawanda
7 through the person of Mark Kamholz notified EPA,
8 hey, we generate this K087 here and we recycle it.
9 They repeated that notification two years later in
10 1988. And they say, yes, we generate more than
11 they even said at that point. We are a
12 large-quantity generator. We generate more than a
13 thousand kilograms a month. But we recycle it.

14 The very next year you have a DEC RCRA
15 compliance inspection, and you may recall seeing
16 the report of that inspection that goes into some
17 detail, handwriting out in the margins and all over
18 the form about this recycling activity.

19 Now, I concede to you that that report doesn't
20 precisely say well, this recycling occurs by the
21 placement of this K087 on top of the coal piles in
22 the coal field. Those words are not in there. But
23 as you look at that report, as you evaluate what is
24 being communicated there, recognize that this
25 inspection in '89 is five years before there was

1 any concrete pad at this facility. It is the very
2 first RCRA compliance inspection this facility has
3 had. The first inspection. The facility has an
4 EPA generator ID number. They've told the
5 authorities we generate K087. The purpose of this
6 inspector going to the facility is to understand
7 how this facility manages the very waste material
8 they've notified that they generate.

9 The report itself on its face tells us the
10 inspectors stayed at Tonawanda for two hours. Two
11 hours for this inspection. And that report
12 concluded, consistent with all of the other RCRA
13 compliance inspection reports, that Tonawanda was
14 recycling this K087 into the ovens. There was no
15 disposal occurring. The plant was properly
16 qualified, not as a large-quantity generator, but
17 as a small-quantity generator, because the bulk of
18 this K087 was being recycled, and therefore didn't
19 count in that small quantity, large quantity
20 equation, and that no RCRA permit was required.
21 Those are the findings consistently in the
22 '89 inspection report, the '90 inspection report,
23 the 2001 inspection report, and the 2007 inspection
24 report.

25 This is the backdrop, ladies and gentlemen, to

1 your evaluation of the testimony concerning the
2 experts who were offered in this case on the RCRA
3 compliance issues. The testimony is uncontradicted
4 throughout these 20 years. From '89 to 2009
5 Tonawanda recycled the vast majority of this K087
6 in the precise same manner that is at issue in the
7 Count 19 and Count 18 of this indictment. By
8 scooping it up, placing it on the coal piles,
9 mixing it with the coal and putting it in the
10 ovens.

11 It defies common sense and flies in the face of
12 logic and flies in the face of the overwhelming
13 weight of the evidence to somehow suggest that DEC
14 over these 20 years simply didn't understand how
15 this company was recycling this K087. That appears
16 to be the posture of the government's approach
17 through this 20 years of regulatory interaction.
18 There was silence in the government's closing
19 summation. And you can't fairly and reasonably
20 weigh the evidence about these counts without
21 thoroughly and completely understanding and taking
22 into account that 20-year history.

23 The only thing that changed, ladies and
24 gentlemen, in 2009 is that a new sheriff came to
25 Tonawanda Coke in the form of EPA RCRA inspectors.

1 And you may recall the testimony of Mr. Corbett
2 that when these EPA inspectors came into town, they
3 didn't bother to look at this regulatory history.
4 They didn't review the file. They didn't
5 understand the background or course of interaction
6 between the company and DEC. They went out to the
7 facility and Mark Kamholz told them in June of 2009
8 what I submit the evidence shows that he had been
9 telling regulators for the 20 years previous. This
10 is how we were recycling this material. We know
11 it's why you're here. This is how we do it. And
12 he told them the exact same thing in June of 2009.
13 But there were different ears listening, and there
14 were different judgments being made.

15 He even told them in June of 2009, and by the
16 way, this material down in the tank, we intend --
17 we are going to use some of this material to --
18 excavate some of this material and recycle it in
19 the same way. And not a single person, not one
20 person in that group of RCRA inspectors that
21 visited the facility in June of 2009 said a word.
22 They didn't raise any issues. They didn't say,
23 hey, wait a minute, you need to do this
24 differently. They remained silent, and they knew
25 it. Not only that this is how they had been doing

1 it, but how they were planning to do it.

2 And now Tonawanda and Mark Kamholz with respect
3 to Count 18 stand charged with a crime for doing in
4 Count 18 exactly what they told the RCRA regulators
5 they were going to do, recycling some of that
6 material from the tanks on to the coal piles.

7 Let me talk a little bit about the RCRA experts
8 that you've heard with respect to these counts. As
9 you know we presented the testimony of Marcia
10 Williams. I plead guilty, as Mr. Mango has
11 charged, to sparing you the testimony of yet
12 another RCRA witness, expert witness. We decided
13 not to call Mr. Johnson to testify.

14 But focus, if you will, on Miss Williams, and I
15 ask you as you're thinking about what the testimony
16 was from these witnesses, as the Judge has told
17 you, you are to weigh the testimony of these
18 witnesses just as you would that of any other
19 person. You weigh to assess their credibility,
20 whether they appear knowledgeable, whether they
21 knew what they were talking about. And you're to
22 rely on that testimony only if you find it to be
23 credible and reliable.

24 I submit to you that Miss Williams came into
25 this courtroom and testified in a very credible

1 manner. She was prepared. She had done her
2 homework. She had read the indictment and knew
3 what the charges were. She had read the documents
4 about the case. She had seen photographs of the
5 facility. She had read testimony that was
6 introduced in the trial regarding the relevant
7 witnesses. And I submit to you that she did all of
8 this before rendering any opinions. And she
9 explained to you her conclusions that I think are
10 very important, and I trust will be valuable to you
11 as you weigh these charges in Counts 17, 18 and 19.

12 She testified that in her opinion this K087 was
13 not even considered a solid waste under the
14 regulatory definitions because it was recycled as a
15 part of a continuous manufacturing process, and
16 also because it was a secondary material from the
17 coke manufacturing process that was legitimately
18 recycled for direct use as a feed stock.

19 But then I asked her, you may remember, all
20 right, well, assume for a moment this did qualify
21 as a solid waste. Does it satisfy this other
22 exemption that you've heard a lot of testimony
23 about, the regulatory numbers 261.4(a)(10). And
24 she said in her judgment and in her opinion that
25 the manner in which this material was recycled,

1 both the K087 and the D018 from the tanks did, in
2 fact, satisfy that exemption, that it was the
3 legitimate recycling, and that the mixture of this
4 material on the coal piles in the coal fields did
5 not constitute land disposal as that term will be
6 defined to you by the Court.

7 And she demonstrated an understanding of that
8 definition, and as you read that definition -- I
9 will not recite it to you now. You are going to be
10 asked to interpret those definitions as well
11 through the filter of your common sense and
12 judgment. And ask yourselves with respect to the
13 management of this material from the K087 to the
14 D087 [sic] what was really going on at this plant?
15 What were they doing? Were they land disposing
16 this material?

17 The evidence overall does not suggest that in
18 any way. And the telling thing I submit, the
19 telling thing about Miss Williams' opinion is that
20 her opinion is entirely consistent with the
21 regulatory opinion that is reflected in the RCRA
22 compliance inspection reports from DEC from 1989
23 all the way up through and including 2007. That is
24 an important piece of corroboration I suggest to
25 you.

1 Mr. Mango suggested -- I won't go into
2 detail -- that coal is the same as ground. I think
3 that suggestion defies common sense. I think it
4 flies in the face of the testimony. The
5 recognition from every one of the RCRA experts that
6 coal in a coke production facility, coal is raw
7 material. And the testimony from the witnesses who
8 knew something about it, the testimony was that the
9 coal in this coal field was anywhere between three
10 to six feet deep. That's not irrelevant. That's
11 not what ground is. This is raw material. And
12 this where this mixture and recycling occurred.

13 Miss Williams understood that. The DEC RCRA
14 regulators inspected this facility for 20 years,
15 they also understood.

16 Now, that really touches on both 18 and 19
17 because the same principles are involved. The same
18 charge is involved, disposal of hazardous waste
19 without a permit. Miss Williams said no permit is
20 required for this legitimate recycling activity.
21 It is accepted from the definition of solid waste
22 for all the reasons I've just gone over.

23 Count 17, the one RCRA storage count relates to
24 this material that's on the ground around the
25 tanks. And the key element there is this issue of

1 whether that material was actively managed by the
2 defendants. Because if it was not actively
3 managed, this abandoned material, material
4 abandoned by a prior owner, if it was not actively
5 managed, it is not subject to the RCRA regulations.
6 So that becomes a key issue for you to grapple
7 with. And you will get a definition there too from
8 the judge. Ask yourself as you read through that
9 definition and as you apply your common sense to
10 that definition, was it really actively management
11 when they spread some coke breeze on this just to
12 harden the surface as Gerry Priamo testified? Was
13 it active management when they spread some coke
14 breeze in order to facilitate heavy equipment
15 moving in that area?

16 Or was there, to the extent there may have been
17 some incidental movement of this material, was it
18 just that, incidental to the purpose of what was
19 really going on? Use your common sense as you
20 evaluate this concept of active management through
21 the filter of the definition the Judge will give
22 you.

23 And by the way, that definition doesn't consist
24 of one word, as Mr. Mango suggested. It is not
25 just disturb. Because if you take that to its

1 logical conclusion, somebody walking past a pile of
2 material on the ground and throwing a rock into it
3 would have actively managed that material and
4 subjected it all to RCRA regulation. That cannot
5 be what the definition means. Common sense tells
6 us that.

7 In contrast to the testimony of Miss Williams,
8 and the 20-year history of regulatory interaction
9 with DEC regarding the management of RCRA regulated
10 waste, the government offered the testimony of
11 Mr. Strickland, and then the testimony of Mr. Flax,
12 and then the rebuttal testimony of Mr. Flax.

13 Mr. Strickland testified when he got on the
14 stand he had not reviewed the notifications that
15 Tonawanda had submitted to EPA. He had reviewed
16 the DEC RCRA inspection report, but he hadn't
17 bothered to talk to Mr. Fisher, whom he knew and
18 was the author of that report. And then he said,
19 and I think this is very telling when you evaluate
20 the weight to give his testimony, and the
21 significance with which he evaluated these prior
22 inspections, he testified as we recall that DEC --
23 the DEC RCRA inspectors may not have understood how
24 the mixing was being done. May not have
25 understood.

1 That, ladies and gentlemen, is nothing more
2 than a guess. And it is a guess I suggest to you
3 that flies in the face of the purpose of 20 years
4 of oversight. And, quite honestly, is an insult to
5 the integrity of the very RCRA regulators that
6 inspected this facility.

7 Now Mr. Flax testified twice. When he
8 testified initially he testified that he hadn't
9 looked at the DEC inspection reports before 2006.
10 He was not even aware that there had been
11 inspection before 1990. He hadn't talked to any of
12 the DEC inspectors. He didn't review the
13 investigative statements or trial testimony or any
14 other statements of witnesses.

15 He also testified in his first attempt at
16 discussing these issues that there was no need to
17 go through this business of solid waste. The solid
18 waste trail, as he phrased it, because K087 is a
19 listed hazardous waste. And without going into
20 detail, he reflected I think a tellingly incomplete
21 understanding even of what the charges were in this
22 case. He thought there was one RCRA disposal
23 count. He didn't understand the time period of the
24 RCRA storage count.

25 He testified the first time he was here, well,

1 I believe that the application of breeze was active
2 management. But when I asked him he had no idea
3 why that breeze had even been applied. He didn't
4 know. He didn't know what the purpose was. He
5 didn't know why it had been done.

6 But when he testified in rebuttal there were
7 some pretty significant changes in his testimony.
8 If you look at Government Exhibit 212, which was
9 displayed during the closing argument, all of a
10 sudden now Mr. Flax has a full-blown rationale as
11 to why this material doesn't satisfy the exclusions
12 from the solid waste definition. He now had read
13 the three counts in the indictment, and he had a
14 thorough rationale as to why K087 and D018 were, in
15 fact, solid waste under that definition. In fact,
16 he had also determined that coke is a fuel. But
17 when I asked him, he couldn't cite to anyplace in
18 the regulations where it says that.

19 He said between his last testimony -- between
20 his first testimony and his last he had learned
21 about this concept of land based management units.
22 But he concluded, tellingly, consistent with his
23 earlier testimony, they have nothing to do with
24 this case, and there's reason to consider them.
25 They don't bear any relation to this issue of land

1 disposal or what it actually means under the regs.

2 I submit to you, ladies and gentlemen, that
3 Martha Williams' testimony and her opinions was
4 simply more credible than the opinions of the
5 experts offered by the government. And again, at a
6 minimum, they are reason to have a -- they are
7 cause to have a reasonable doubt as to whether or
8 not a permit was required for any of the activities
9 described in Counts 17, 18 and 19.

10 I'm going to next and finally turn to this
11 issue of entrapment by estoppel. Chief Judge
12 Skretny will provide an instruction on this. As I
13 said a little bit ago, it is probably not a defense
14 that you've heard of before. But it's been
15 determined that it applies in this case, and it is
16 an important defense. It has kind of a fancy name,
17 but the fact is that the meaning of this defense,
18 we submit, is very simple and it's very direct.
19 And it is true that it is the burden of the defense
20 to establish this defense.

21 But there's a significant difference that
22 Mr. Mango didn't reference, and that is while the
23 government's burden in proving these charges is by
24 proof beyond a reasonable doubt, to establish this
25 defense, the defendants only need to prove the

1 components I'm about to discuss by a preponderance
2 of the evidence, and that means 51 percent. That
3 means proof that something is more likely true than
4 not. And the elements of this defense which you
5 will receive in the instruction are that the
6 government, in this case the DEC and the EPA
7 inspectors, led the defendants to reasonably
8 believe that they were authorized to engage in the
9 conduct that is now the subject of these charges.
10 That the defendants reasonably relied on statements
11 or conduct, and that means actions or failures to
12 act of these government officials. And the
13 defendants don't have to show that the government
14 actually authorized the conduct, just that the
15 government and its agents seemingly or appeared to
16 authorize the conduct. And that in one way or
17 another, the defendants reasonably disclosed this
18 conduct to the government before or at the time it
19 was authorized.

20 So how does that defense apply to these
21 charges? Because there's another part of the
22 instruction, and it is this. This entrapment by
23 estoppel defense doesn't somehow negate any of the
24 elements of any one of these offenses. What it
25 does, and the Judge will instruct you. This

1 applies to Counts 1 through 15 and 17, 18, and 19.
2 What it does is say this defense recognizes that
3 even though the government may have proved all of
4 the elements of a crime or any one of the crimes,
5 to convict the defendant for acts committed in
6 reasonable reliance on the conduct of the
7 government would violate due process and concepts
8 of fundamental fairness.

9 So even if the government has proven any of one
10 of these crimes beyond a reasonable doubt, this is
11 a complete defense and would require you to return
12 a verdict of not guilty if we have established the
13 elements I just outlined by a preponderance of the
14 evidence.

15 With regard to the pressure relief valve,
16 Counts 1 through 5, as I said, this component in
17 the by-products department was open and obvious on
18 this line since at least the 1970s. The DEC
19 inspectors were at that plant at least -- the air
20 inspectors were at that plant at least once a year.
21 And as you consider that information about the
22 frequency of the visits, take into account also the
23 testimony that the government wants to emphasize
24 about how often this valve released. How credible
25 is it? How believable or plausible is it? If this

1 valve is, in fact, releasing every 30 minutes or
2 nearly every 30 minutes, how plausible is it that
3 in all these years no DEC inspector ever happened
4 to see this thing?

5 In addition, Tonawanda expressly and explicitly
6 notified DEC and EPA that this pressure relief
7 valve was there in 2003 in that HAPS inventory
8 report. Told them it existed. Told them it was on
9 the coke oven gas line. And then -- and we think
10 this is very telling evidence. The testimony about
11 the April 2009 inspection, this air inspection
12 where there is quite a bit of discussion about this
13 pressure relief valve where the existence of the
14 valve is confirmed, where there is discussion with
15 Mr. Kamholz and Mr. Cahill and the regulators about
16 how the valve operates, about the fact that it
17 releases when the ovens reverse, the ovens cause
18 the release. That the pressure is monitored in
19 this green shack and here are the pressure charts.
20 It was known to everyone at that point that this
21 device, this component, this valve was not in the
22 facility's Title V permit. That was their
23 testimony, uncontradicted testimony.

24 And following this week-long inspection from
25 air inspectors from both DEC and EPA the company

1 was not told, hey, you've got to blank off this
2 valve. You've got to file an amendment to your
3 permit. You have to do something to somehow amend
4 your submissions to the agency. All they were told
5 was, listen, see what you can do to elevate the
6 pressure -- the set point for the valve, or
7 otherwise lower the system pressure in the coke
8 oven gas line. That was all that was requested of
9 them by this whole panel of regulatory inspectors,
10 and that is exactly what they did.

11 If you were asked to do that based on that
12 information by an official, isn't it reasonable for
13 you to rely on the indication through that conduct
14 and those statements that this is permissible as
15 long as you make the adjustments that I'm asking
16 you to do. And the evidence isn't in conflict
17 about this. That evidence is uncontradicted.

18 We submit that this evidence establishes not
19 just by a preponderance, but very persuasively all
20 the evidence I've just outlined. That Tonawanda
21 had reasonably disclosed the existence of this
22 valve before 2009. That DEC and EPA had at least
23 seemingly authorized the PRV through their words,
24 their actions, and their inactions over many years.
25 And it was reasonable for Tonawanda and Mark

1 Kamholz to rely on that interaction, those
2 reactions from the regulators.

3 And finally, the last point of this defense is
4 that to convict Tonawanda for acts committed in
5 reasonable reliance on this conduct by the
6 government's representatives would, in fact,
7 violate fundamental concepts of fairness and due
8 process. I won't go through all of the details,
9 but the same principles, ladies and gentlemen,
10 apply to the consideration for the requirement for
11 baffles in quench tower number 1. That's the
12 quench tower that had this exemption. How more
13 forceful could it be that the regulatory agency
14 that has had intimate contact with this company for
15 decades has told the company you have an exemption
16 for baffles, and so the company doesn't put baffles
17 in. And now they stand before you charged with
18 five felony counts. That's not fair. It's an
19 unfairness that is reflected in the email I showed
20 you from Mr. Eng, and it is an unfairness that
21 infects this indictment.

22 With respect to your consideration of quench
23 tower number 2 and the baffles in quench tower
24 number 2, the focus of your consideration there
25 really turns on your assessment of the company's

1 interaction with Gary Foersch over the years that
2 this was an issue, from '96 all the way through
3 2009. Thirteen years. Ask yourself what was it
4 that Gary Foersch really communicated by his words,
5 by his conduct, his actions, and his inaction?
6 What did he communicate over those 13 years? And
7 we submit to you that the evidence is clear that he
8 communicated baffles in quench tower number 2 are
9 just not important to me. I'm not going to push
10 the issue. I know it's in the permit. We all know
11 it's in the permit. But I'm not going to push
12 this, and I'm not going to make an issue. And
13 Tonawanda and Mr. Kamholz relied on that
14 interaction in believing reasonably that that was
15 the judgment of the DEC inspector that was sent to
16 them to oversee compliance with this permit.

17 The same issue on this defense applies to each
18 of the RCRA counts as well, 17, 18 and 19. What
19 was reasonable for Tonawanda to understand from
20 this 20 years of interaction with the DEC RCRA
21 regulators? The only reasonable conclusion we
22 submit to you is Tonawanda reasonably understood --
23 first of all, they reasonably disclosed what they
24 were doing. They raised their hand and said we've
25 got this material, we're recycling it. They stood

1 for inspections at least four times in that 20
2 years, and were told again and again and again and
3 again you don't need a permit. Your recycling
4 activity is sufficient. You're a small-quantity
5 generator and there are no violations.

6 But the new sheriff in 2009 said differently.
7 EPA assesses this conduct, largely ignores this
8 regulatory history, and determines with this
9 stacked deck approach to enforcement that the
10 concept that is reflected in this indictment that
11 these were, in fact, criminal violations.

12 But ask yourself these questions, ladies and
13 gentlemen, not just with respect to the RCRA
14 counts, but all the counts in this indictment. If
15 those were in fact criminal violations, why hadn't
16 DEC on its own previously concluded that these were
17 serious violations that warranted enforcement
18 action? What had changed in 2009? The activities
19 didn't change. The activities didn't change at
20 all.

21 What changed is we have a new agency coming in
22 that's going to apply its own judgment and its own
23 gloss and without proper and fair consideration for
24 decades of regulatory interaction, make enforcement
25 decisions that have resulted directly in the

1 charges before you in this indictment. I ask you
2 to remember as you think about these counts and
3 this defense, this defense is an absolute defense,
4 if we've shown it to you by a preponderance, an
5 absolute defense to Counts 1 through 15 and 17, 18
6 and 19.

7 Now, I will sit down in a moment, but you're
8 going to be asked to -- probably sometime
9 tomorrow -- retire, consider and weigh this
10 evidence and to ultimately reach unanimous
11 verdicts. And as you do that, as you reflect on
12 this duty and your discharge of this duty, I ask
13 you to keep in mind that our word verdict comes
14 from an old Latin word, veredictum, which means to
15 speak the truth. We submit to you that the
16 evidence in this case shows that the truth is the
17 government has failed to meet its burden of proof
18 beyond a reasonable doubt as to each of the counts
19 I have referenced. The truth is that the conduct
20 that is the subject of this indictment was known to
21 and at least tacitly, if not explicitly authorized
22 by DEC for years. And applying this law to the
23 facts and using your common sense and your
24 fundamental sense of fairness, we ask you to return
25 not guilty verdicts as to each count in this

1 indictment as to Tonawanda Coke. I thank you very
2 much for your attention.

3 THE COURT: Okay, Mr. Linsin, thank you.
4 How's the jury doing, ladies and gentlemen? Doing
5 okay? Okay. Lets take 15 minutes, and we'll bring
6 you back in a little bit. Thank you.

7 (Jury excused from the courtroom.)

8 THE COURT: Okay. Please have a seat. If
9 we go until 15 minutes it's 5:00 o'clock, then
10 we're are running a little bit behind. I'm sorry?

11 MR. PIAGGIONE: I was going to make a
12 suggestion. Mr. Mango suggested I not make a
13 suggestion.

14 THE COURT: Okay. I watched the jury. I
15 mean, there was a little bit of a grumble about
16 coming back in 15. Do you want to go forward,
17 Mr. Personius, you're next, or should we start
18 tomorrow morning? It's -- either way is okay with
19 me.

20 MR. PERSONIUS: I'm prepared to go
21 forward, Judge, but I'm concerned that it is
22 4:40 or 4:45, whatever time it is, and I certainly
23 don't want to have a situation, if we can avoid it,
24 where I went and the government would do the
25 rebuttal in the morning. I don't think that

1 would --

2 THE COURT: We wouldn't do that. But I'm
3 concerned about oversaturation, frankly. I mean,
4 the arguments were a little bit longer than I
5 expected, and we did get that hour late start. I
6 mean, this would have been 4:00 o'clock instead of
7 5:00 o'clock. That would have been a different
8 story.

9 You know, the more I look at the charge that I
10 have to give tomorrow -- and thank you for putting
11 so much of the burden on me to instruct all these
12 definitions -- but, you know, be that as it may,
13 right? It has to be. And I think our discussions
14 were very productive. You know, Michelle is kind
15 of tired. And I do want to get some deliberation
16 in.

17 But I think what I'll do is I'll call the jury
18 back out, and I'll suggest to them that we're
19 willing to go if they want us to go. But, we can
20 come back, given the length of the arguments,
21 tomorrow morning and still have a productive day.
22 Does that work from everybody's standpoint?

23 MR. MANGO: Yes, your Honor.

24 MR. PERSONIUS: If the jury were to say,
25 Judge, we would like to go today, I think we'd go

1 with their desire, as long as Michelle is able to
2 continue.

3 THE COURT: You think they'll want to go
4 today? I mean, continue on today, is that what
5 you're saying?

6 MR. PERSONIUS: What I was saying was I
7 think we leave it up to the jury. The only other
8 consideration I suggest we weigh is Michelle, and
9 if Michelle feels good about moving forward too.

10 THE COURT: Michelle is a marathoner, and
11 so this is good prep for that. And I'm not
12 disrespectful of her time. And I don't mean to --
13 to sound like I am. All right. Let's -- I'll kind
14 of suggest to the jury that I think we should break
15 unless there's vehement objection. And then we'll
16 start tomorrow with the final closing argument and
17 the rebuttal. Then it will give us a chance to
18 better fine tune the charge.

19 Okay. If you're not adverse to that, I think
20 we'll give that a try, and we'll have the jury back
21 in in five minutes or so. All right. And then
22 we'll try to work it that way.

23 MR. PIAGGIONE: Thank you, your Honor.

24 THE COURT: All right. Thank you.

25 (Short recess was taken.)

1 THE COURT: Okay. The attorneys and the
2 parties are back assembled. I think I'm going to
3 amend what I left you with. I don't think I'm
4 going to give the jury the option of staying. I'm
5 just going to send them home. And then I'm going
6 to discuss with you -- if you can stay for a little
7 bit. One, I think we need to talk about the
8 verdict form. Because I think in light of the
9 parties' positions with respect to the
10 applicability of the entrapment defense by estoppel
11 we may have to include a reference to that on our
12 jury form on the respective counts. And so I want
13 to talk to you about that and any other
14 modifications, because, frankly, nobody has said
15 anything about the jury form.

16 We don't have the definitions yet. I do have
17 some amendments to the proposed charge, but I need
18 a little bit of time just to finalize my
19 discussions with Andrew. And then I'd come out and
20 give you what we have up to this point in time.
21 And then we can talk about it tomorrow maybe a
22 little bit more productively and efficiently. I'd
23 like to do that. And I'd feel more comfortable,
24 rather than rush through with a super-saturated
25 jury, not having enough time to feel totally

1 comfortable with the amendments to the charge, and
2 then again not doing anything with the verdict
3 form. Okay.

4 So, I need you to, if you will, have somebody
5 stay around for maybe an additional 15 or 20
6 minutes just so I can finish up part of what we
7 didn't have time to discuss. Is that okay with
8 everybody?

9 MR. PIAGGIONE: Yes, your Honor.

10 MR. LINSIN: That's fine, your Honor.

11 MR. PERSONIUS: Yes, your Honor.

12 THE COURT: All right. Chris, if you
13 bring the jury in.

14 (Jury entered the courtroom.)

15 THE COURT: Please don't sit down. Okay.
16 I think you've sat enough for the day. There was a
17 lot of information that was presented to you in the
18 closing arguments. What I'm going to do is adjourn
19 you for the day, and we would start tomorrow at the
20 regular time. And, I mean, very honestly, I need a
21 little bit of time to work with the attorneys.
22 We've got some issues that will put us in a better
23 stead to get the case to you as soon as the
24 arguments are complete. I'm going to have to --
25 you heard what I'm going to have to do, which is to

1 present you with a lot of definitions, a lot of
2 information. I want to make sure that I get it
3 right from your standpoint, and it's going to be
4 lengthy. So I want you as fresh as you are every
5 day at the start of the day. Okay. And I don't
6 want you weighed down because, you know, this -- I
7 think you'll find when it's all over and with the
8 charge, it's not going to be burdensome, but it's
9 going to be a lot of work and tedious to go through
10 everything and put it into the right perspective so
11 that you can do your job and get that unanimous
12 verdict back on the counts that are in the
13 indictment. And, you know, we all have to do our
14 jobs as best we can to make that happen.

15 So, if you don't mind, even if you do mind,
16 we're going to send you home. I say that with some
17 degree of apology if you were counting on staying.
18 I guess I must be in another world sometimes.

19 But we'll see you back here -- I've got a
20 little bit of a lengthier calendar tomorrow, but
21 I'd like you here at 9:30, and it might be a little
22 bit later when we start, quarter to ten, in that
23 vicinity. That's what I'll be shooting for, maybe
24 ten, but not later than that, okay? If you don't
25 mind, I'd be happy to see you around 9:30 if I can

1 do it. If not, it's going to be a little bit
2 later.

3 Be safe on the way home. Don't mess up. Don't
4 get into any trouble. Come back safe with an open
5 mind. You're about to start that deliberation, and
6 we've come a long way together. We'll see you
7 tomorrow at what time?

8 THE JURY: 9:30.

9 THE COURT: And if it's not exactly 9:30,
10 about what time?

11 THE JURY: 10:00 o'clock.

12 THE COURT: Okay. So long. Thank you
13 very much. Appreciate it.

14 (Jury excused from the courtroom.)

15 THE COURT: Okay. So, I do want you to
16 take a look at the verdict form, and what I'm
17 suggesting is that we'll probably have added on to
18 each one of the counts except 16 the language to
19 the effect that if you are unanimous in your
20 verdict with respect to satisfying the elements of
21 the charge beyond a reasonable doubt, you know, the
22 next question would be, you know, how do you find
23 with respect to whether or not the defendants have
24 established by a preponderance of the evidence the
25 estoppel by entrapment defense.

1 And if you are contrary to that, which I see
2 the government's taking issue with that, I want
3 some specific authority from you in that regard.
4 And if there's any supporting authority from the
5 defense, please, you know, anything along those
6 lines, that would be helpful. But I think we might
7 have to go that route. But I'd like some hard
8 authority if it's there. Unless you disagree.

9 MR. LINSIN: No, no. Your Honor, in
10 truth, we had not focused -- I had not focused on
11 the verdict form. I agree with the Court's initial
12 instincts. We will look for some authority. Are
13 you suggesting we bring this back to you tomorrow
14 if we can find it, or are we going forward tonight
15 to talk about the verdict form?

16 THE COURT: No, we're not going to talk
17 about it tonight. We're going to talk tomorrow.
18 What I need is -- I don't have all of the, I don't
19 think, fully completed the redrafting of the
20 different parts of the indictment that we talked
21 about earlier, because we don't have the
22 definitions and things.

23 MR. MANGO: I'm going to send those.

24 THE COURT: Send those over to us. But
25 what we do have I need a few more minutes to go

1 over, and then I'll give you the redraft. And
2 we're going to eliminate all of those intentionally
3 left blank areas of the charge. I think it will
4 look better. We'll repaginate and we'll make the
5 adjustments on the table of contents as well. So
6 we'll do all of that. That's going to take us a
7 little bit of time. So if you could hang in there,
8 say, until 5:30, I think I can have this all fully
9 reviewed to my satisfaction, and then I'll get it
10 to you, and you can work on it overnight, and we'll
11 talk tomorrow. Fair enough?

12 MR. LINSIN: Yes.

13 MR. MANGO: Thank you, your Honor.

14 (Short recess was taken.)

15 THE COURT: Okay. Let me just -- well,
16 the attorneys are present. And what I've
17 distributed is our revised proposed charges. And I
18 just want to reference for you where we made the
19 changes. And I still have not resolved a couple of
20 points, and I really want your input on it. We
21 won't do that today. I prefer to have it tomorrow
22 when you get a chance to think about it.

23 But if you look at the first three charges, 38,
24 39 and 40, those are the elements of the offense.
25 And those are for the broken down groups of counts,

1 I just want to direct your attention to the third
2 element in the charge for charge number 38 and the
3 third element in charge number 40. All right. The
4 third element basically has added the verbiage or
5 the words from the indictment so that it's
6 consistent. Okay.

7 Now, I'd like you to take a look at charge
8 number 39. And I'm not sure that I'm comfortable
9 with the third element, and I'm cautious about not
10 adding an additional element to the government's
11 proof. And if you look at the final line in the
12 third paragraph, I'm not convinced that that is
13 articulated just exactly right or that it should be
14 placed there. It may be okay. But I want to hear
15 from you on that.

16 The other thought I had in that regard is to
17 place the wording, if it works, the "in
18 noncompliance with any applicable exemption"
19 language after the word "defendant" in the second
20 line of that paragraph. I almost think it's better
21 there, but it's a little bit of a distance from the
22 baffle system. So, see what you think. And I
23 think we have to maybe discuss that a little bit,
24 okay?

25 In charge number 46, the second paragraph was

1 added.

2 In charge number 54 you look at the
3 introductory paragraph to Count 17, there's
4 language there that references "without a required
5 permit." The same is true for 18. But I'm not
6 sure about 19. I didn't include it. I don't know
7 if it should be, and that's what I want to really
8 get your input on. And I don't know the answer to
9 it. So I want you to give some thought to that or
10 maybe you know right now whether it should be
11 included, the language without --

12 MR. LINSIN: Well, your Honor, I can defer
13 my comments to the morning. But the requirement
14 for a permit is applicable to Count 19 as well as
15 Count 18. They are both disposal counts. They're
16 both disposal without a permit. And so my request
17 initially was to -- all three of these RCRA counts
18 are premised on the absence of a required permit.
19 And so I thought a parallel amendment would be
20 appropriate for each of these introductory
21 paragraphs.

22 THE COURT: Okay. I wasn't really sure.
23 So, I'm open to that. I will consider it as
24 something I will include unless the government
25 convinces me otherwise tomorrow. So that all three

1 would be identical in terms of the introductory
2 paragraph referencing without a required permit.

3 MR. MANGO: Your Honor, the only word I'm
4 looking at is the "required." I don't know if
5 that's necessary. So I'll be prepared to discuss
6 that in the morning. If -- you know, rather it
7 would just say without a permit. I'll discuss that
8 tomorrow.

9 THE COURT: Okay. Okay. And then charge
10 number 57, the first element has the language with
11 respect to the actively managed. It's in the first
12 couple of lines of the paragraph beginning "first"
13 for Count 17. Okay. That's -- that's where we're
14 at.

15 And then we need your definitions, and then I
16 think that gives us everything we need, right? But
17 we've got to work on the verdict form as well.

18 MR. LINSIN: May I make a preliminary
19 comment on 57, your Honor?

20 THE COURT: Sure.

21 MR. LINSIN: My concern with this
22 formulation is at least as to Count 17 that we are
23 folding into one element -- we're folding two
24 elements into one. And it becomes very tricky then
25 when you make, you know, findings, whether we've

1 got unanimity on one or both and it's -- if the
2 concept is valid that these are both required
3 factual elements of the government's burden, I
4 believe it should be broken out into two separate
5 elements.

6 THE COURT: All right. We'll put that out
7 there for discussion. And maybe some wisdom will
8 be bestowed upon the prosecution to understand why
9 that's so important to the defense here without the
10 fact that -- you know, with the hopes that it won't
11 be prejudicial to your case from the standpoint of
12 the way you look at it.

13 Okay. That's, I think, our best effort at this
14 point, and then we'll see how the timing goes
15 tomorrow. I don't want to keep the jury waiting
16 very long tomorrow. I don't think they expect to
17 start at 9:30, I mean the way things have been
18 going. And 10:00 o'clock, we can massage that a
19 little bit. But, hopefully there won't be too much
20 that we need to address tomorrow.

21 All right. It would help maybe if you
22 talked -- you know, if you could come to an
23 agreement on this, it would save us a lot of time.

24 MR. LINSIN: All right.

25 THE COURT: Thank you. Appreciate it.

1 MR. MANGO: 9:30, your Honor, for us?

2 THE COURT: Yeah. I mean, if you're going
3 talk in the morning, you might want to get here
4 earlier. 9:30 is the absolute earliest I'll be
5 ready, and I really don't think -- I think there's
6 two or three sentences that I have to get in, so,
7 but they're not -- well, every sentence is a major
8 sentence, but they're not as big as some of the
9 cases are.

10 MR. MANGO: Thank you, your Honor.

11 MR. LINSIN: Thank you, your Honor.

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CERTIFICATION

I certify that the foregoing is a
Correct transcription of the proceedings
Recorded by me in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Official Reporter
U.S.D.C., W.D.N.Y.